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PROFESSOR SIDNEY POST SIMPSON

We regret to announce the death of Professor Sidney Post Simpson who had for some years been a valued member of our Editorial Board, and had contributed more than one article. Professor Simpson, who was only fifty-one years of age, was a graduate of the Harvard Law School, where he afterwards held a chair.

After seeing service with the U.S. forces during the war with the rank of Lt.-Colonel, he took charge, for the American Bar Association, of the arrangements for refresher courses for American barristers returning from military service. On the completion of that task he was appointed to a chair at the New York University Law School. Fortunately he lived to see the appearance of his monumental '*Law and Society*', a casebook in jurisprudence which he had built up with the collaboration of Professor Julius Stone.

Professor Simpson took a lively interest in the *Modern Law Review* from the beginning, and had since its early years acted as corresponding member in the U.S.A., in which capacity he was able to give us valuable advice and assistance. We look back with pleasure on his visit to this country in July, 1949, when he was present at meetings of the Editorial Board and of the Editorial Committee, and when we held a party in his honour.

Professor Simpson was undoubtedly among the outstanding personalities of his generation of American law teachers. He brought inexhaustible energy, a wide range of scholarship, an astonishing versatility, and a quite unusual objectivity to his work. Much influenced by the sociological jurisprudence of Roscoe Pound his radical temperament reacted with a certain aggressiveness against the purely conservative attitude of many law teachers, and all who stand for the progressive movement in legal administration will feel that they have lost a keen ally.

C.

CONTRIBUTORY NEGLIGENCE

THE road to the reform of the common law is hard and stony, and even when the Legislature has passed the reforming Act, difficulties still emerge from the old rule, the dry wood which the Act sought to cut away. Such has been the experience with the Law Reform (Contributory Negligence) Act, 1945, which I shall refer to as the Act: it was entitled 'an Act to reform the law of contributory negligence'. The former law of contributory negligence at common law was defaced by two main difficulties. If the court held that the damage was the result of the fault of both parties, the whole action failed, and there was no power to apportion the damage where it was held to be caused by or contributed to by the fault of both parties. The Act by s. 1 on its face was intended to remedy both defects :—

> 'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . .'.

The court had thus two closely associated duties imposed upon it, the former being a necessary step to the other. It had to decide that a case was one in which both parties were to blame, and having decided that, to go on to decide how the loss was to be apportioned. Both these duties, in a sense, were new. Before the Act, the court could only find a single verdict of liability or non-liability. If the fault of the plaintiff was proved as a contributing cause, the action was dismissed, but of course the court had to decide first of all if there was contributory negligence in the sense that both parties were to blame. As long ago as 1887 Fry L.J., a great judge, demanded why the court could not be empowered to divide the loss. The reform of the common law is a slow business. The mills grind slowly, but when all is done and a simple and efficacious rule is provided, still there are difficulties to be surmounted. In *Grant* v. *The Sun Shipping Co.* [1948] A.C. 549, that very learned and far-seeing Lord of Appeal, Lord du Parcq, whose unexpected and lamented death we all mourn as a loss to our law, speaking of a line of reasoning of which he disapproved, said it seemed 'to be akin to that which has led to frequent and determined attempts to establish the so-called rule of "last opportunity", of which less will be heard since the decision of your Lordships' House in the *Admiralty Commissioners* v. *North of*

Scotland Steam Navigation Co., Ltd. [1948] A.C. 140 ("*Boy Andrew*")'. The Act seemed clear enough in words and intention, but the question was raised on these words whether thereby it abolished the so-called rule of 'last opportunity'. Lord du Parcq's disapproval, which I share, is re-inforced by Lord Simon's words in the *Boy Andrew* (*supra*), at p. 149, where he said:

> 'The suggested test of the last opportunity seems to me inaptly phrased and likely in some cases to lead to error, as the Law Revision Committee said in their Report: "In truth, there is no such rule—the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?"'

The fact that the words Lord Simon quoted were taken from the Committee's Report is not, in itself, material. What matters is that Lord Simon gave these words authority, by quoting them as expressing his own opinion. On well-settled principles of English law the report of a Governmental Committee recommending a change in the law has no legislative or other authority. The simple reason is that when legislation follows, it is the words of the Act which fix the law. The Legislature does not necessarily or slavishly follow what the Report said. Indeed, it frequently modifies it. The words 'whose act caused the wrong' must, of course, be construed as referring to legal responsibility, not mere physical causation.

It may be said that the question is merely academic, and that the position of an act in the time sequence of the events leading up to an accident cannot be decisive of legal responsibility which must clearly depend upon potency of effect in producing the damage. That seems clear enough. The 'last opportunity' has bulked so large in discussions on contributory negligence that I think even the spectre should be exorcised. The Act aimed at reforming the law and setting up a simple and practical scheme for settling liability. The last act or, I imagine, omission, which I suppose is what is meant by the least clear chance or opportunity, sometimes described as the act of the last wrongdoer, may be of such a character as to lead a jury to hold that it was in its potency the sole cause. There would then be no question of contributory negligence at all. That test is adopted by the House of Lords in *Swadling* v. *Cooper* [1931] A.C. 1, affirming the view of the very experienced and wise judge, Travers Humphreys J. When the junior counsel in that case interposed during the summing-up, on the judge's invitation, to ask, 'Does not the element enter into it who was guilty of the last act of negligence?' the judge replied, 'Not necessarily; whose negligence was it that substantially caused the injury?' The House of Lords unanimously approved that direction as a true statement of the law. Clearly the mere element of time cannot decide the issue. Potency, not chronology, is the test. I shall later again refer to the point. It is difficult to find

express references to the 'last opportunity' in the law reports until the important judgments which I shall discuss later. It was, however, decisively rejected in *The Volute* [1922] 1 A.C. 129, and in *The Eurymedon* [1938] P. 41. The way in which the defenders of the 'last opportunity' put their contention was that the Act did not purport to change the law as to what constituted contributory negligence, but merely to give better remedies and remove procedural difficulties. If, as I think, the true position is that the words and purpose of the Act are inconsistent with the 'last opportunity', that would dispose of this objection. The inconsistent rule would be repealed ipso facto, but the ghost can be laid to rest also by showing that it was only a ghost. There was no such rule of law. We must never forget the warning emphasised in *Tart* v. *Chitty* [1933] 2 K.B. 453, against confusing questions of law with questions of fact. The law is normative and peremptory. The questions of fact no doubt pre-suppose the law, but the application of the law then depends entirely on the particular circumstances of the particular case, and I think that what is called the rule in *Davies* v. *Mann* (1842) 10 M. & W. 546 is only a statement of the particular conclusion reached upon all the circumstances, but even if it was a rule of law, it has been decisively rejected. To support my present conclusion, I shall later examine the English cases before the Act, and consider whether there ever was such a rule. I think that the court never deserted substance for a mere formal test. Clearly the test of the substantial cause may result in attributing the whole injury to one single cause which, in fact, on a review of the whole situation may turn out to be the last negligent act. That, however, does not admit of or require any special rule of law, but it is essential to prevent the simple and direct efficiency of the Act being embarrassed and confused by unnecessary and fallacious objections. The substantial cause, by which I mean legal cause, is of course a matter of fact and degree which pre-supposes that the fundamental law has been properly laid down and applied.

Obviously, the first problem is to find the negligent cause or causes. Causes brought into existence by the one party or the other which do not involve negligence, are immaterial to the issue whether there is contributory negligence, which means combined negligence. Plurality of causes, which are the acts of different persons jointly producing injury to the plaintiff, are something which is familiar enough. Apart from contributory negligence, the law relating to them is described as the law of joint tort-feasors. It was fully discussed in *Grant's Case* (*supra*) in Lord du Parcq's judgment. In contributory negligence there are combined acts of negligence since all negligence consists of human acts. The only peculiarity is that one of the negligent actors is the plaintiff, or person claiming. That circumstance led the old common lawyers to the quaint but troublesome idea that if the

plaintiff was at all in fault his action must be dismissed, though the major fault was that of the defendant. The illuminating case of *Dowell* v. *General Steam Navigation Co., Ltd.* (1855) 5 E. & B. 195 illustrates this rule. It is quoted by the House of Lords in *The Volute* (*supra*). As to the question of the 'last opportunity', I think the most intelligible statement is to be found in the judgment of the Lord Chief Justice in that case, which was not accepted by the House of Lords, but was inferentially rejected. The jury, in their verdict in *Dowell's Case*, found that the preponderance of blame was with the defendant although there was fault on the part of the plaintiff. The judge entered judgment for the plaintiff, but the court said that the judgment as it stood amounted to a verdict for the defendant. The precise explanation of this curious rule, that the plaintiff who is in any way at fault cannot recover anything from the principal wrongdoer, seems to have been that the common law courts could not, or would not, apportion in pieces the damage contributed to, both by the plaintiff and the defendant, as the Admiralty Court did. It has been suggested in one place that the purpose was moral, namely, to inculcate care; or it may have been a scholastic but fallacious attempt to apply in strict formal logic, the principle that causa proxima, or the last cause, is what is to count. It was, however, more probably due to procedural and pleading points, like other anomalous parts of the old common law. The plaintiff could declare upon the defendant's negligence, as in *Davies* v. *Mann* (*supra*), or nuisance, as in *Butterfield* v. *Forrester* (1809) 11 East 60. Against that declaration, the defendant would plead the general issue, simply the words 'not guilty', and that was a sufficient plea to entitle him to show that the accident was in part due to the plaintiff's own negligence; thus the plaintiff who had alleged that the accident was due to the defendant's negligence failed. One consequence of that was to reduce the number of reported cases at common law on contributory negligence. The principles of contributory negligence which the common law has now to settle will find their best exposition in Admiralty cases, particularly since 1911, when the Admiralty Court, which long had had power to apportion damage and contributory negligence, was vested under the Maritime Conventions Act, with power not only to apportion between the parties found to be in fault, but to apportion in accordance with the respective degrees of fault. Lord Atkin has said that it is impossible to deal with the law of contributory negligence without regard to causation (*Caswell* v. *Powell Duffryn Collieries Associated Co.* [1940] A.C. 164). Lord Atkin had been defining the cause of action for what has been called statutory negligence, which is expressly included in the definition contained in the Act: he went on :—

> 'But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the

omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which " contributes to cause " the injury, a phrase which I take from the opinion of Lord Penzance in *Radley* v. *London and North Western Ry.* And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who " caused " the injury; and you must not be deterred because the word " cause " has in philosophy given rise to embarrassments which in this connection should not affect the judge. Nor is this question of contributory negligence one that arises only in cases where the defendant is charged with negligence, as though the negligences belong to the same pack and one trumps the other. In the leading case of *Butterfield* v. *Forrester* the action was a case for obstructing the highway whereby the plaintiff was injured. No negligence appears to have been alleged and the action appears to have been a simple action for a nuisance on the highway. The authority cited in argument from *Buller's Nisi Prius*, 26.9. so describes the action. I quote from the 7th ed., of 1817: " So if a man lay logs of wood cross a highway, though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me I may bring an action : for wherever a man suffers a particular injury by a nuisance he may maintain an action ". Yet it is in such an action that Lord Ellenborough laid down the classic rule : " One person being in fault will not dispense with another's using ordinary care for himself ". And the omission by the plaintiff to use ordinary care may be the sole cause of the injury as was held in *Butterfield's Case*, or have contributed to cause the injury as in the numerous cases which appear in the books. It may be said finally that if contributory negligence is not regarded from the point of view of causation it is difficult to see how damage comes to be divided under the Admiralty rule which is adopted in ordinary cases of injury in other systems of jurisprudence, and which persons of authority think should be adopted in ours.'

But causation does not necessarily import responsibility. Many causes may co-operate to produce a casualty. In cases of contributory negligence the only causes which matter are what can be described as negligent causes; hence many contributing causes must at once be written off. That is, perhaps, too obvious to mention, though it may need to be borne in mind. When two vessels collide the whole burden may fall on one, because she was negligent while the other was free from blame (see *The Alcoa*

Rambler [1949] A.C. 236), but all the same, that vessel, though free from blame, may have been a cause, because it was by her being where she was at the time that she was run into. The inquiry must, in the first instance, be directed to the issue of liability, that is to ascertain if one or both parties have been negligent. In the words of Lord Atkin, in contributory negligence the word is, or must be, used with a difference. Negligence generally imparts a duty to another person to take care. The duty is not a necessary part of the definition of negligence, because it is included in the word. In contributory negligence, however, the negligent plaintiff may owe no duty to anyone but himself, which is a contradiction in terms. A duty does not exist in the air. The object must be identifiable if it exists in the ordinary sense of the word. The plaintiff in contributory negligence may owe a duty to the defendant as well, but primarily the question is simply one of his failing to take ordinary care of himself and his property. The concept of contributory negligence is that two parties are in fault in a legal sense, and each, accordingly, is liable to contribute to the damage in proportion to the part he played in the causation of or responsibility for the damage. It is, however, clear that the liability in contributory negligence does not depend merely on causation, but on responsibility at law. Indeed, that is true of every case of negligence. There can be no negligence in the eyes of the law unless damage attends it. Causation is thus a question of fact to be examined on ordinary common law principles, in the sense laid down in the *Monarch Steamship Co.* [1949] A.C. 190. Both the finding of the negligence and the finding of the damage and its apportionment are different aspects in applying the appropriate legal principles to the facts. Causation is, as it were, a part of the raw material for defining legal responsibility. Either party's conduct must be examined on the same principles to ascertain if, in view of the knowledge of the situation which the party had or ought to have had, the damage was or ought to have been foreseeable by him, in regard to the injured party. Thus, if one party has created what has been called a static obstruction, like leaving an unlighted car in the roadway, he must be taken in law to have foreseen the danger of its being run into in the dark. That has been called a static obstacle, but it is dynamic in the sense that while it is left it is a continuing potential cause of mischief, like a continuing nuisance discussed in *Sedleigh Denfield* v. *O'Callaghan* [1940] A.C. 880, for which the landowner, who knew of its existence though he did not create it, was held responsible because he knew he had left it unremedied. So many cases of contributory negligence deal with road obstacles, that this instance of a static object has often needed consideration. The defendant is responsible because, when he left the unlighted obstacle on the highway, he ought to have foreseen the potential danger to others and therefore he is pro tanto responsible.

Negligence consists of human acts, but in the case of continuing negligence its operation is not limited in time to the moment when the act was done, but continues until the effect of the other party's negligence comes in and in combination with the continuing and still operative negligence of the other party, produces the accident. They must concur in their operation at the same time. As to the necessity of foreseeability as a necessary condition of liability, it is not a question of fact what the party foresees but what the court holds he ought, as a reasonable man, to have foreseen, and that is normative in character and is therefore to that extent a question of liability. In the same way, a factory or mine owner charged with liability for injury to his workman resulting from a breach of the Factory or Mines Act, may now be held responsible if the court holds that he ought to have foreseen the prospect of workmen being inattentive to their own safety. These and kindred questions which are often described as questions of fact and degree depend, as I have already stated, on how the court defines the legal standard, which is a question of law, and then applies it to the circumstances of the case. The whole question of liability, however, must turn on a foundation of causation in fact, which must be analysed by the court in accordance with legal principles. Hence I prefer to say in all these cases, that a man is legally responsible for the damage rather than that he caused it. In the same way in cases where knowledge is essential, it may not be actual but imputed knowledge. He is deemed to know what he ought to know. He is negligent in not knowing and liable accordingly. A bad look-out is a frequent ground for liability in a collision at sea and the same applies on land. I may note in passing that I should prefer, myself, not to use the phrase 'constructive knowledge or awareness' in such a context. Even in commercial law, the expression 'constructive cause' has been disapproved. Owing to the frequency with which contributory negligence has come into question in marine collisions and road accidents, there is a tendency to illustrate the rules of law by instances taken from these areas.

Before I turn to the authorities, I venture to add some few remarks in regard to priority of causes in the time sequence of an event. Questions of that nature have arisen in connection with contracts, in particular, marine insurance, and been decided on the basis of giving weight to superiority in potent effect, as against priority in time. Thus in many cases there has been a competition between causes which has to be solved in order to reach a decision on which insurance policy the loss falls. Generally the contest is whether the loss should fall on the marine or war risk policy. In insurance emphasis is always placed on the maxim, which is as fallacious as are most maxims, *causa proxima non remota spectatur*. In the case of *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* [1918] A.C. 350, a ship was torpedoed, but

in her damaged and crippled state got into port; before she had been repaired, a storm came on and she sank and was a total loss. It was held that the substantial cause of her loss was the war peril, not the ultimate cause, the storm. Lord Shaw at p. 370 summed up the position in the following words :—

> ' In my opinion the real efficient cause of the sinking of this vessel was that she was torpedoed. Where an injury is received by a vessel, it may be fatal or it may be cured : it has to be dealt with. In so dealing with it there may, it is true, be attendant circumstances which may aggravate or possibly precipitate the result, but which are incidents flowing from the injury, or receive from it an operative and disastrous power. The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold. The result is produced, a result attributable in common language to the casualty as a cause, and this result, proximate as well as continuous in its efficiency, properly meets, whether under contract or under the statute, the language of the expression " proximately caused " '.

This is not, in some ways, a strict parallel, but it recognises that the potent effectiveness of earlier causes may count for more than later operations. The last straw may break the camel's back, but it cannot rank as the substantial cause. To treat the last cause, chance or opportunity as the substantial cause necessarily and irrespective of anything else is an offence against common sense. As Lord Shaw said at p. 369, ' The cause which is truly proximate is what is proximate in efficiency '. A little earlier he said :

> ' To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause '.

The duty of the court in a case of contributory negligence, if there is a combination of different causes, some emanating from the plaintiff and some from the defendant, being the acts of negligence which combined to cause the damage, is to realise that justice can only be done by evaluating the comparative effectiveness of each party's contribution to the ultimate injury. The problem of how much each contributed to the injury is, I repeat, a question of fact and degree.

Metaphors are dangerous things. To talk of the chain of causation is justly condemned by Lord Shaw. It has led to misleading

expressions, like breaking the chain of causation, or *novus actus interveniens*. In real life there are combined and composite interacting causes; new intervening causes (as shown in the case of joint tortfeasors) from the time when the causes begin to operate until all the contributing causes meet in the casualty and cause the damage. Only then is the complete set-up of negligence constituted. However, the last act does not nullify all the causes which precede it. The man who fires the train only explodes the magazine because everything else necessary to produce that effect has been prepared. The last straw only breaks the camel's back because of all the other things which have been placed upon it. The cases will show how small a percentage admit of the last opportunity, if it can be identified at all, being treated as the decisive cause. There may no doubt, though rarely, be such cases. Travers Humphreys J. answered the junior counsel's question whether the substantial cause was dependent on the last opportunity, by replying 'Not necessarily'. I may observe in anticipation of the authorities to be cited, how difficult it is to pick out the last act, or to say there was a last opportunity. Causes are generally mixed up with the rapid interplay of events in the mêlée. It is very difficult to see how there could be combined negligence at all unless, as I have said, the causes were operating at the same time. It has been strenuously contended that there cannot be contributory negligence unless the acts are simultaneous, but in *The Volute* (*supra*) that idea was rejected. It is fallacious to treat the time when the act was done, as the time at which the effects of the act operated causally. Even if the last act is separated in time, its character may often, and perhaps generally, be coloured by the whole previous situation. I may add that until the common law was changed by the Act, it was impossible to get a true theory of contributory negligence. The earlier decisions are apt to be unsatisfactory and misleading because the court could not find more than one fault. A really comprehensive theory of contributory negligence can indeed only be extracted from the Admiralty cases, the most important and crucial of which are *The Volute* (*supra*) and *The Eurymedon* (*supra*). These two cases contain the most logical definition of the principles of contributory negligence. It is true that some years before the Act, and possibly under the influence of the Admiralty decisions, attempts were made to improve the common law of contributory negligence, and I shall have to refer again to *Caswell's Case*, and also to another case in the same volume, that of *Lewis* v. *Denye* [1940] A.C. p. 921. These were both cases in which the court had to determine a question of contributory negligence. In the former the action was for damages for negligence in not fencing a dangerous machine in breach of the

statutory requirements. The defence was that the workman himself had been negligent. If I may quote what I said in that case, while still exercising judicial functions, at p. 179 :—

> ' . . . at least since *Davies* v. *Mann*, the law in discussing contributory negligence in such cases has disregarded as not materially contributing causes some acts of the plaintiff which might be regarded as negligence in a sense, and treated them as of subsidiary moment in ascertaining the causation of the injury and has fixed attention on what was judged to be the proximate or effective cause. Hence the question was stated as it was in *Swadling* v. *Cooper* to be what was the substantial cause. Contributory negligence involves two elements, negligence and contributing negligence. The policy of the statutory protection would be nullified if a workman were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself, threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury. This follows, I think, if the rules of contributory negligence in road accident or collision cases are suitably adapted to deal with breaches by an employer of his statutory duty '.

In my references to *Davies* v. *Mann*, I think my meaning was that the plaintiff's negligence was not treated as a materially contributing cause, if its effects could have been, and ought to have been, avoided if the defendant had exercised ordinary care. This I think is all that was meant in that case. In any event no one in 1940 attached any importance to the time sequence. In the case of *Lewis* v. *Denye* (*supra*), Lord Simon quoted a passage from Lord Atkin in *Caswell's Case*, which I have already cited, and went on :—

> ' . . . An act of this quality was at least a substantial cause of the appellant's injury and therefore contributed to it so as to exonerate the respondent from liability '.

The respondent was the defendant and he was claiming that the plaintiff's negligence being at least a substantial cause of the injury exonerated him, under the common law rule that the loss could not be apportioned. The time sequence was again rejected or ignored, as in *Swadling* v. *Cooper* (*supra*), to which I have already referred. Though the main issue there was the sufficiency of the judge's direction to the jury, the decision was based on the legal proposition that the question for the jury was what was the substantial negligence which caused the damage. The Legislature in the Act rightly did not refer to the supposed rule of law, called the last opportunity, because they did not think it was necessary to do so. The Act gave the court a mandate to decide if both parties were in fault, and if so, to apportion the damage. The Act, in doing so, necessarily changed the substance of the law which before the Act would have required the court to dismiss the plaintiff's

claim if the plaintiff's fault wholly or partly caused the damage. If the law had treated the time sequence as a decisive test that would have appeared clearly in the cases. The Act in giving the court power to apportion as well as to find that there was contributory negligence, obviously brought the common law into line with the Admiralty law on this point. However, no further changes were necessary to produce this effect in the Act. The common law was sufficiently defined, and the court was to proceed to fulfil its mandate to decide whether or not there was contributory negligence. The passages I have quoted from the authorities before the Act were not mere obiter dicta, but were the grounds or basis for the decisions. The only points changed by the Act were such statements as that of Lord Simon at p. 931 : ' In that case (*i.e.*, where the plaintiff is negligent) the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default '. That was the rule of law which the Act was changing. The provisions in the Act for apportionment showed the consequences which were expected to follow from a decision on the issue of contributory negligence. In practical life the possible complex of ordinary circumstances may take many forms. You may have negligence piled upon negligence which would indeed be paradoxical if everything could be ignored except the last act of negligence—like the last straw on the camel's back. The whole question of contributory negligence must, as Lord Birkenhead said in *The Volute* (*supra*), be settled on broad common-sense lines, as a jury would. As we know, in running-down cases the negligent acts are in most cases practically simultaneous, even though an observer with a stop-watch could register a succession in time. There may, however, be cases of separate and several negligence, if I may again quote from *The Volute* (*supra*), and then it is always a question of degree whether there is, or is not, a sufficient separation in time and place to justify either a finding that one or another was the sole cause, or more frequently that both were in fault and that the damage was due to combined negligence, in the light of the general conditions which define legal responsibility and in their application to particular circumstances. Acts of negligence on both sides, even multiplied and successive, may well be material to be reckoned with in fixing shares of liability. Questions of multiplication, succession or simultaneity are merely incidental in the valuation of the complex situation. There must always be a certain complication in contributory negligence cases because the question has regard to combined negligences of at least two parties. Hence, what is called the rule in *Davies* v. *Mann* (*supra*), is not a rule of law, but merely a guide helpful perhaps in some cases to the court in determining shares of contribution. If either party's negligence has contributed to the damage, at whatever stage, early or late, of the situation which culminated in the

injury, there should now be contribution accordingly. The court is not now limited to finding a single cause.

Davies v. *Mann* belongs to a set of two cases, *Butterfield* v. *Forrester*, *Davies* v. *Mann*, which are summarised by the House of Lords in *Swadling* v. *Cooper* (*supra*), which I shall quote. *Butterfield* v. *Forrester* is perhaps the more instructive. In that case the plaintiff complained that he had been injured by a nuisance created by the defendant in placing a pole across the highway. The plaintiff riding violently ran into the pole and was injured. The case is noteworthy because Lord Ellenborough with his rough horse-sense laid down the wise axiom ' one person being in fault will not dispense with another taking ordinary care for himself '. That was in 1809. Perhaps a more accurate jurisprudence might have said that there was fault there on both sides, but what Lord Ellenborough meant was that the substantial fault was with the plaintiff. No reference was made there to ' last opportunity '. The court had to decide who substantially caused the damage and was content to fix the liability on the plaintiff as the sole cause. *Davies* v. *Mann*, which we knew in early days as the ' donkey case ', was again a nuisance on the highway in the form of a hobbled donkey left there by the plaintiff. The poor helpless animal was killed by being run over by an outfit, belonging to the defendant, consisting of three horses and a wagon. The driver had left the horses' heads; he was a little behind the horses at the moment and not exercising any control. On one view it might have been said that each party was in fault, but the facts are briefly and obscurely stated. It was, however, accepted that notwithstanding the fault of the plaintiff's servant in leaving the donkey, yet the defendant could have avoided the accident by ordinary care on his part. It is interesting to note that Lord Hailsham's judgment in the case of *Swadling* v. *Cooper* (*supra*) sums up these two cases very briefly :

> ' Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence : the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances. All this is familiar law and is commonly illustrated in textbooks by contrasting the cases of *Butterfield* v. *Forrester* and *Davies* v. *Mann* '.

Lord Hailsham is clearly intending to give a summary of the law and not merely explaining how much or how little need be included in a summing-up to the jury. Though it is true that he said that on the facts there was no room for the application of the doctrine that was illustrated in *Davies* v. *Mann*, he added, the crucial question was that stated by the learned judge which has already been quoted : ' Whose negligence was it that substantially

caused the injury?' The whole tenor of Lord Hailsham's speech is inconsistent with any doctrine of the efficacy of 'the last clear chance'. This doctrine, if it be a doctrine at all, receives no more support from the decision in the House of Lords in *Radley* v. *L. & N. W. Ry.* (1876) 1 App.Cas. 759. The facts were simple enough. A colliery company owned a bridge over a railway siding; the bridge was eight feet high. The colliery were in the habit of placing their trucks in the siding, and the railway company from time to time used to take the trucks away. The railway engine driver, doing this one morning, did not notice that on one of the trucks there was placed another truck, so that the joint height was eleven feet. As he drove the trucks on to get them off the siding, he found himself met with an obstacle, but he went on pushing and, in doing so, broke down the bridge. In the Exchequer Chamber it was held that the substantial or sole fault lay with the colliery people, who should have given notice of the unusual obstacle, and were accordingly liable for the whole damage. The House of Lords on the contrary put the blame on the railway company for not ceasing to force on the trucks and finding out what the obstruction was. The judge had directed the jury that the plaintiffs, the colliery company, who claimed for the damage to their bridge, must satisfy the jury that the accident happened solely through the negligence of the defendants' servant, and that if both sides were negligent so as to contribute to the damage, the plaintiffs could not recover. The House of Lords ordered a new trial. The jury, they said, ought to have been told that though the plaintiffs' negligence may have contributed to the accident, yet if the defendants could by ordinary care and diligence have avoided the mischief, that is, if they had not been negligent, the plaintiffs' negligence would not excuse them. That was only an example of the general rule that plaintiffs could not recover if they were partly in fault. The jury were not told, as they should have been, to consider that ordinary care and diligence on the part of the engine driver, notwithstanding any previous negligence of the colliery company, would have made an accident impossible. I do not know what, on the new trial, the jury found, but in any event, I do not find any statement of a general principle of 'the last clear chance'. In principle it is merely accidental that the substantial cause may be the last cause. There was no doubt a sequence in that case. The substantial cause had to be ascertained on the whole situation. That was good sense. The duty of the court was to fix the liability. But for the arbitrary rule that the common law court could not apportion the loss, it may well have been held that both parties were in fault. The jury was certainly not to be directed to consider who was guilty of the last act of negligence as was suggested by the junior counsel in *Swadling* v. *Cooper* (*supra*).

The true rule now is to be found by examining the judgment of the House of Lords delivered by Lord Birkenhead in *The Volute*

(*supra*). That was a case in Admiralty subsequent to the Maritime Conventions Act of 1911, which, as I have said, first gave the Admiralty Court power, in addition to the power the court had always had to apportion damages where both ships were to blame, to fix the proportions in accordance with the relative degrees of fault. This is a power essentially similar to that now given to the courts of common law under the Act. The collision in question there was between a destroyer, the *Radstock*, and a merchant vessel, the *Volute*. It was war-time and the vessels were part of a convoy. The *Volute*, as convoy leader, ought to have given a signal when changing course. She did not, and in consequence of the omission to give a signal, the *Radstock* took the wrong action of porting her helm and going full speed ahead and thus causing a collision. The *Radstock* was clearly to blame and her action was the last action taken. But the House held that the *Volute's* wrongful omission to sound the signal also contributed to the casualty, and held both vessels to blame. The reasoning of the judgment delivered by Lord Birkenhead can only be properly understood by reading the whole. Certain salient features may, however, be illustrated by a few quotations. I may here observe that the Admiralty law and the common law have always been in agreement on the principles of what constitutes contributory negligence, though up to the Act of 1945 they have differed as to the remedy. Now the two courts are substantially in agreement in both respects and hence the principles laid down in *The Volute* are the law of the common law courts as well as the Admiralty. At this point reference may also, if necessary, be made to what was said in the case of the *Anglo-Newfoundland Co.* v. *Pacific S.W. Co.* [1924] A.C. 406.

Lord Birkenhead, after referring to the authorities, said that in contributory negligence the acts of negligence need not be synchronous, and thus negatived the essential importance of the last chance. As to the cases where the acts are not synchronous, he made the following observations which go to the root of the matter. I must quote these observations in full :—

> 'Mr. Marsden, writing before the Maritime Conventions Act passed, suggests as matters of contributory negligence acts or motions either concurrent in time or identical in character or equal in degree of fault. If this be correct, the acts of negligence need not be synchronous.
>
> Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as

being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect '.

These observations on the law, which are as clear as they are comprehensive, were then applied by Lord Birkenhead to the facts of the case. He said : ' . . . if the *Volute* had not neglected to give the appropriate whistle signal when she ported there would have been no collision. On the other hand, if the *Radstock* in the position of danger brought about by the action of the *Volute* had not gone full speed ahead, there would have been no collision '. He then concluded : ' In the present case there does not seem to be a sufficient separation of time, place or circumstance between the negligent navigation of the *Radstock* and that of the *Volute* to make it right to treat the negligence on board the *Radstock* as the sole cause of the collision '. I may note that Lord Birkenhead in his judgment sets out a long quotation from *Dowell's Case* (*supra*) in which Lord Campbell C.J. refers to *Davies* v. *Mann*, and says : ' There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject : and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss '. That passage may seem to state a practice in 1855 in determining the causes of an accident to disregard the plaintiff's negligence in cases where the effects of that negligence could have been avoided if the defendant had exercised ordinary care and skill, so that when he did not do so, he is debarred from relief as against the plaintiff on that part of the plaintiff's conduct which, in fact, contributed to the damage. That is certainly, on the face of it, a technical and arbitrary rule inconsistent with the principles specifically laid down and defined by Lord Birkenhead for deciding according to ordinary plain common sense. The whole idea of ordinary plain common sense is to include the whole sequence of events and give to each part of them its appropriate value in the causing of the damage. Looking at the totality of the sequence which led up to the casualty, I take it accordingly that Lord Birkenhead in laying down the rule he did, was necessarily excluding as irrelevant that part of Lord Campbell's judgment which deals with this point. What is quite clear, however, is that Lord Birkenhead expressly came down against any doctrine of the last opportunity. I refer particularly to the passage at p. 137 :—

' . . . Contributory negligence certainly arises when the negligence is contemporaneous, but are the only cases of contributory negligence cases where the negligence is contemporaneous? Is it to be the rule that in all cases if the tribunal can

find a period at which A's negligence has ceased and after which B's negligence has begun that then the negligence of A is to be disregarded? If such should be the rule it will be found that the cases of contributory negligence would be few'.

This judgment delivered by Lord Birkenhead is, I think, the most comprehensive and illuminating examination of the general principles of contributory negligence. I remember that it was reported as a matter of current gossip at the time that Lord Phillimore, who was one of the House, had had at least a considerable hand in the preparation of that speech, and certainly it shows a remarkable grasp of principle and remarkable care in selecting the particular authorities on which reliance was placed. As a contrast to the facts in *The Volute*, I may refer to the *Anglo-Newfoundland Case*, which I have already mentioned. The House there held that one of the two vessels, the *Alconda*, was solely to blame. The other vessel was being launched in a narrow channel in the Clyde and in the process obstructed, to some extent, the passage way. The *Alconda* saw the exact position and received and acknowledged notice of it. This latter is a most important feature, because it emphasises the element of awareness which is illustrated in all the cases where a question of contributory negligence has arisen. A question of negligence can only arise if the situation is or ought to be, apparent. This is particularly emphasised in the case of *The Eurymedon* (*supra*), to which I shall refer in a moment. In *The Alconda* the position was perfectly obvious, but notwithstanding that, the *Alconda* attempted to force a way down the narrow channel left by the launch, and in doing so, ran aground. Lord Shaw in his speech repeated a useful passage from Lord Selborne's speech in *Spaight* v. *Tedcastle* (1881) 6 App.Cas. 217, observing that an omission by one vessel in some earlier stage to do what should have been done, ought not to be regarded as contributory negligence, if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed. To the same effect are valuable observations of Lord Watson in *Cayzer & Co.* v. *Carron Co.* (1884) 9 App.Cas. at p. 887.

Lord Shaw in [1924] A.C. at p. 420 included in his speech a passage the purport of which was quite clear in its context, expressing a view of *Davies* v. *Mann* and showing how such a view might fit in with the facts of a case. What Lord Shaw said was :—

> '. . . I take the principle to be that, although there might be—which for the purpose of this point I am reckoning that there was—fault in being in a position which makes an accident possible yet, if the position is recognised by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognising the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided.

> Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered. There is a period of time during which the causal function of the act or approach operates and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake; but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced '.

It is to be noted that in the course of that passage, Lord Shaw deals not with negligence but with recklessness, which is generally a different matter, to which contributory negligence would not apply, because recklessness may be tantamount to a deliberate action. It is impossible, I think, to treat that passage as involving a doctrine of the rule of the last opportunity, and if it did, it would be inconsistent with the views of the whole House of Lords in *The Volute*. A mere dictum of one Lord of Appeal cannot be treated as overruling these views. I have referred to the case because it seems to me to be a very good illustration by way of contrast with the events in *The Volute* to point out what might have been in the mind of Lord Birkenhead when he referred to a subsequent and separate act of negligence. By that would generally be meant something in the nature of an independent act of negligence, either subsequent or prior to the final issue supervening upon an existing situation. Apart from that, however, he may be also contrasting an anterior situation which can be said to have been preliminary to the subsequent operations which were responsible for the damage. What he says is quite consistent with the test of broad common sense because he is fixing attention on the substantial negligence which caused the accident. He also makes the crucial test of negligence, awareness actual or imputed of the situation. In *The Eurymedon* (*supra*), in the judgment of Bucknill J., as I may note in passing, that learned judge observed that if the accident in question had occurred in daylight and those in charge of the *Eurymedon* had known that the *Corstar* was at anchor, there would have been ample time to avoid her without difficulty. The facts may be stated quite shortly. The *Corstar* had been negligently moored in such a way that with the tide she swung round right across the fairway and blocked that to a considerable degree. After dark the *Eurymedon* was going down the Thames and failed to recognise the position of the *Corstar* which was unusual and improper, in time to take appropriate helm or other action. In his admirable judgment, Bucknill J. held that they should have found that those on board the *Eurymedon* should

have realised the position earlier. Bucknill J. summed up his conclusion, which is quoted by Greer L.J. in the Court of Appeal in this way :—

> 'In this case those in charge of the *Eurymedon* did not appreciate the fact that the *Corstar* was at anchor until it was too late to avoid her. I have already decided that the *Eurymedon* was to blame for not taking earlier action by reducing speed, but the negligence of the *Corstar* in allowing herself to get into an improper position does seem to me to be wrapped up with part of the negligence of the *Eurymedon*. To quote the words of Lord Birkenhead in *The Volute* : " In the ordinary plain common sense of the business the *Corstar* has contributed to the accident by her negligence ". I therefore find both vessels to blame '.

This conclusion was affirmed by the Court of Appeal in three valuable judgments, in which the earlier cases were discussed. So far as the point of the 'last opportunity' is concerned, I can sum up the position, I think, by quoting a short passage from the judgment of Scott L.J., because all the Lords Justices were of the same opinion :—

> 'During the hearing of the appeal Mr. Carpmael, for the *Corstar*, cited to us most of the cases in which the principle of *Davies* v. *Mann* has been discussed, but in my view the broad feature which results from the cases is, alike in Admiralty and at common law, that the final question is one of fact, to be decided by the tribunal of fact, with due regard to all the circumstances of the case, as Bucknill J. pointed out at the end of his judgment. I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense. I respectfully agree with a phrase of Lord Wright in *McLean* v. *Bell* : " the decision of the case must turn not simply on causation but on responsibility ". When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but the determining factor in the result, since *ex hypothesi* but for that last link the result would never depend only on the last link. This is especially so in maritime collisions, just because in the behaviour of large vessels the effect of a given cause may for physical reasons continue in operation for a long time, or may not show itself at all till after a considerable interval of time. And if the cause was set in operation by negligence, it will not lose that characteristic merely through the lapse of time. Until some other person comes " into range " as it were —I include the personified ship of Admiralty parlance—the duty of proper navigation is doubtless abstract, for a breach of

it affects no one; but, as was said by Anglin J. in the judgment quoted with approval by Lord Sumner in *British Columbia Electric Ry.* v. *Loach*, on the emergency happening the abstract obligation becomes a concrete duty towards the person affected by it '.

One further passage from the same learned Lord Justice may usefully be quoted :—

> ' The idea that the last act of negligence is necessarily or even presumably to be regarded as " the efficient, proximate or decisive " cause of the collision, imputing a legal conclusion of sole responsibility, was rejected by Lord Birkenhead in his opinion in *The Volute*. He there pointed out that there are many cases where the two negligences—of plaintiff and defendant—are not synchronous, but successive; and yet that in these cases it may be right for the court to hold both parties to blame, because on the broad common-sense view both contributed to the result.'

These authorities now state the common law rule as much as the Admiralty rule because the rules of what constitutes contributory negligence are the same both in Admiralty and in common law, notwithstanding the differences in fact between a collision of two taxi-cabs and a collision between the *Queen Mary* and a battleship. I take the general law to which the Act applies now to be that which was summed up by Lord Birkenhead and which is also consistently laid down or recognised in the modern authorities, to some of which I have referred—such decisions as *Swadling* v. *Cooper*, *Caswell's Case* and *Denye's Case*, the case of *The Boy Andrew*, and all cases in which no effect was given to an arbitrary rule of the last opportunity, but the investigation was entirely directed to ascertaining what was the substantial cause or causes, if there were contributing causes, of the casualty. The same can be truly said about all the recent cases on this point. The modern law is, I think, made quite clear by the House of Lords in the decisions that I have referred to, including what was said in Lord du Parcq's judgment in *Grant* v. *Sun Shipping Co.* (*supra*), and especially *The Volute*. As I have pointed out, in *The Volute* there was a separate and several act of negligence on the one side, and the same is true of *The Eurymedon* and *The Boy Andrew*. If the law was giving a technical effect to ' the rule of the last opportunity ', it ought to have done so in these cases, but it did not, and the common law implicitly rejected any abstract ' rule of the last opportunity ' in these recent cases in the House of Lords. Some doubts have been raised about the effect of what has been called static negligence. By this is meant, I apprehend, a case where an obstacle or danger or nuisance is left by the man who placed it there, but his responsibility obviously continues as long as the danger itself. The negligence becomes contributory as soon as contact is established by a new negligence and

the casualty and damage follow. To produce the effect the negligences must be combined. The last chance, which I suppose means the last act or omission in the course of the combined causation, cannot be cut off and separated notionally from the whole complex. There is no chain of causation with separate links; the last straw that breaks the camel's back only has that effect because of the burdens previously imposed and left to load the animal. Generally speaking, in most accidents no one has a last chance. I have given some instances to the contrary, but they are merely illustrations of the successive acts of negligence, as contrasted with the more ordinary cases of what may be called simultaneous or synchronous negligence in which the whole complex of circumstances happens so close together that for practical purposes there is no real means of fixing on a succession. The so-called 'rule of last opportunity' which, as I have indicated, I do not regard as a rule of law in the proper sense, is merely a convenient guide in some comparatively rare cases to ascertain the cause or causes to which the damage can be attributed. It is, therefore, as has been said by Denning L.J. in the case to which I shall next refer, rather a test of causation. Apart from that, it can never be more than a mere arbitrary and illogical rule of thumb to which no doubt sanctity in the earlier law has been attached. As such it has not, and never has had, any logical basis. It serves no purpose of utility or social welfare or logical cogency and I hope will disappear from the discussions in books, as in the same way it has generally been passing from the actual judgments of the courts.

Since the Act became law two important decisions have been given in the Court of Appeal in which there was devoted a good deal of discussion to the question of the so-called rule of last opportunity or last clear chance. One of these is *Davies* v. *Swan Motor Co.* (*Swansea*) [1949] 2 K.B. 291. The leading judgment was given by Bucknill L.J. who, as we have seen, had been a judge sitting in the Admiralty Court on the trial of *The Eurymedon*. It was, like so many of these cases of contributory negligence, a collision on the road, and was between a dust lorry and an omnibus. The court held that as between these two, both were in fault, and both therefore contributed to the damage to the plaintiff.

The plaintiff, who was a dustman employed by the Swansea Corporation, was at the time in a position on the side of the lorry which was prohibited by his employers. As a result of his position he was seriously injured. He tried, when the two vehicles collided, to get out of the way by scrambling into the lorry, but failed, and was so seriously hurt that he died soon afterwards. As he had been disobeying orders not to be in that position on the lorry, a case was made that his breach of duty contributed to the accident. The court held that the case was made out and that, in consequence, his damages were to be reduced under the Act by 20 per cent. There is a long discussion by the judges in the Court of Appeal of

the general principles. It is, I think, clear that there no true case of the last opportunity was established on any view. The accident happened, so far as the man was concerned, without warning; as Evershed L.J. said, the man was injured in the mêlée. There does not seem to have been any real dispute whether there was contributory negligence or not. None of the Lords Justices felt called upon to give a precise ruling on the suggested rule of the 'last opportunity'. In effect, I think it is not altogether incorrect to say that the whole court were of opinion that the rule of the 'last opportunity' was never a rule of law, but if it was, it suffered a demise independently of the Act. Denning L.J. went on to say that the so-called doctrine was not a principle of law but a test of causation, and was a fallacious test because the issue did not depend on proximity in point of time. As to the rule in *Davies* v. *Mann* Evershed L.J. reserved his opinion, and took the view that questions under *Davies* v. *Mann* did not arise in that case; Denning L.J., as I have said, expressed a rather different opinion. I cannot, however, at this stage in this brief article, examine in any detail the very valuable and instructive judgments given in that case. I will only note that Lord Justice Bucknill quoted in full the passage which I have quoted from Lord Birkenhead in *The Volute*, and was prepared to decide the case before him on the basis of ordinary plain common sense as required by Lord Birkenhead's judgment. The other case which has been decided by the Court of Appeal since the Act is *Henley* v. *Cameron* (1949) 65 T.L.R. 17. This is summarised in the judgment of Bucknill L.J. in the *Swan Case* just cited. He says that in *Henley's Case* the defendant negligently left his motor car unlighted on the highway and a motor-cyclist with headlights, and therefore presumably able to see it, ran into it and was killed. The question was whether the defendant by leaving his unlighted vehicle on the road was guilty of negligence which contributed to the accident, or was it solely due to the motor-cyclist who saw the vehicle and could have avoided running into it. Tucker L.J. and Singleton L.J. held that both parties were to blame, but Asquith L.J. held that the motor-cyclist was alone to blame. The majority of the court, I think, came to their conclusion on the basis of the broad common-sense view propounded by Lord Birkenhead in *The Volute*. The Lord Justice who dissented, in a very interesting judgment, analysed the facts to show that in his opinion the motor-cyclist was alone to blame. I find it difficult to agree, notwithstanding the respect I have for that very learned Lord Justice, in the particular reasoning by which he arrived at that conclusion. I agree with the majority.

I wish to say that I have read a great many very learned and ingenious discussions of these questions contained in a number of articles published by law journals in this country and in the United States and in the Dominions, and I hope I shall be acquitted of any failure to give due weight to all the fluctuating and subtle arguments

with reference to this so-called rule which has been called 'the rule of the last opportunity'. It is strange to me that so much learning and analysis should have been applied in regard to what, in the last resort, appears to me to be either a rule of thumb or a fallacious so-called principle. In the same way, I have not been able to deal in detail with decisions or Acts of the Legislatures in the Dominions touching these matters. There are, of course, limits to the space which can be allotted by publishers to a writer in one of their journals, and I have been granted a liberal allowance. I should like to make one concluding observation, not perhaps very pertinent here, and that is, that I think the courts may sometimes tend to go too far in their reverence for precedents. It was unfortunate perhaps that in comparatively recent days, the House of Lords decided that it was bound by its own decisions, and within the last few years the Court of Appeal has applied the same rule to its own decisions. I should have thought that for all practical purposes, it would have been enough to attribute persuasive but not coercive authority to previous decisions, but in any case, matters of observation, for instance, discussions as contrasted with decisions, while often very valuable for sidelights which they throw by way of explanation and reconciliation on the law generally and on the decisions, cannot claim the coercive authority of actual judgments. If that were not so, the range of multiplicity of precedents would definitely be extended, and we might have the curious picture of several conflicting precedents from a single case in which the judges agree in the result but for different or differently elaborated reasons.

WRIGHT *

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PUBLIC WELFARE OFFENCES, STATUTORY DUTIES, AND THE LEGAL STATUS OF THE CROWN

A RECENT decision of the High Court of Australia [1] has—for the first time as it seems—raised a problem of considerable theoretical and practical importance, part of the wider question of how to adjust old legal concepts and theories to twentieth century conditions of government and society.

Under the Australian Commonwealth Re-establishment and Employment Act, 1945, employers are under a duty to reinstate persons who have completed a certain period of war service, in their former employment. A further section provides that they shall not without reasonable cause terminate or vary such employment. Offenders are liable to a penalty of £100, to be imposed by a court of summary jurisdiction. Other sections of the Act provide, for certain other offences, imprisonment not exceeding six months, alternatively or in addition to a penalty. The whole Act is specifically declared binding upon the Crown.

The defendant, who was a manager of a Commonwealth munition factory, was prosecuted before a court of petty sessions in Victoria for unlawful termination of the plaintiff's employment. Conviction was possible only under section 5 of the Commonwealth Crimes Act, which provides that ' any person who procures or by any act of commission is in any way directly or indirectly knowingly concerned in or party to any offence against any law of the Commonwealth, shall be deemed to have committed that offence, and shall be punishable accordingly '. Although there is increasing support for the view that the person who can act directly on behalf of a corporate body is its organ or alter ego,[2] the defendant in this case was only in the position of a servant. His conviction was therefore dependent upon his being an accessory to an offence committed by the Crown. Although the High Court decided by a bare majority to confirm the order of the magistrate dismissing the information, the majority of the judges did not reject the possibility of the Crown being convicted for a criminal offence. A short analysis of the different judgments well illustrates the strains to which the steady expansion of commercial and managerial government activities in the ' mixed economy ' of Britain and the Dominions exposes traditional legal thinking.

[1] *Cain* v. *Doyle* 72 C.L.R. 409 (1946).

[2] *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* [1915] A.C. 705; cf. Winn, ' Criminal Responsibility of Corporations ' (1929) 3 C.L.J. 398, and Welsh, ' Criminal Liability of Corporations ', 62 L.Q.R. 345.

Only the Chief Justice (Latham C.J.) dismissed the idea that the Crown might commit a criminal offence as unacceptable in principle. His objections were, first, that the fundamental idea of the criminal law is a prosecution of offences against the King's peace; secondly, that the Crown itself would have to be a prosecutor in the case of serious offences; thirdly, that the Commonwealth would have to pay a fine to itself; and fourthly, that where imprisonment was at least an alternative penalty, the Crown could not be included as it could not be imprisoned.

Dixon J., with whose judgment Rich J. concurred, took a less rigid view. He did not regard the imposition of a criminal liability upon the Crown as a theoretical impossibility. But he thought that there was the strongest presumption against such an interpretation of any statute: 'It is opposed to all our conceptions, constitutional, legal and historical. Conceptions of this nature are, of course, not immutable, and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them. But we should at least look for quite certain indications that the legislature had adverted to the matter and had advisedly resolved upon so important and serious a course'. The following reasons persuaded Dixon J. that the present Act did not displace the presumption: first, there was no court with summary jurisdiction over the Crown; secondly, any fine would go to the Federal Treasury, which would thus have to pay fines to itself; thirdly, the Crown had power to remit fines; fourthly, if the answer were different, two or more ministers or other Crown servants could be held guilty of conspiracy. All these technical considerations were, however, in the opinion of Dixon J., only illustrations of the wider principle 'that the King is not under the coercive power of the law'. Like Latham C.J. he drew a distinction between the penal and the merely directive aspects of the statute. Even without penal sanctions, an Act might still impose certain duties on officers of the Crown and their neglect might be remedied by injunction or mandamus or civil remedies.

The dissenting judgments of Starke and Williams JJ. took an entirely different line. Starke J. emphasised that 'Sovereign bodies may create rights and obligations against themselves and submit the determination of those rights and obligations to the jurisdiction of the Courts and provide means for enforcing them', and that 'A penal sanction does not seem an impossibility, especially when, as in this case, the judicial authority may order that portion of the penalty be paid to the employee'. He thought that if the duties imposed on governments could not be enforced against them, the effectiveness of the Act would be seriously impaired. Similarly, Williams J. saw no constitutional difficulty in the way of the Sovereign binding himself in Parliament. Both judges pointed out that the Commonwealth had been subject to liability in contract

and tort since the Judiciary Act of 1903. Williams J. did not regard difficulties of enforcement as decisive, as the Crown might be presumed to meet its legal obligations out of the moneys provided by Parliament.

Thus, four out of five judges of a court which is not noted for either radicalism or disrespect for the principles and traditions of the common law, did regard the criminal conviction of the Crown as at least theoretically possible. It is submitted that this conclusion is not only theoretically correct, but that it represents one of the necessary adaptations of legal thinking, if the inevitable extension of governmental responsibilities and functions is to be balanced by an extension of the rule of law. This means a removal of the lingering remnants of the historical identification of the Crown with the person of the King, and of both with the modern State.

All the specific reasons produced in the High Court against criminal liability of the Crown seem unconvincing. First, the subjection of the Crown to summary procedure is a mere technical matter, not an objection of principle. A comparable technical obstacle was overcome when the (English) Criminal Justice Act, 1925, s. 33, provided for the trial of corporations by indictment. Nor is there any reason why submission of the Crown to summary procedures should not follow from an Act which is specifically declared applicable to the Crown. Secondly, the possibility that the Treasury might both pay and receive fines presupposes the unity and indivisibility of the Crown, which should now be discarded. The purpose of a fine, especially in penalties for administrative or social welfare offences, is not always primarily to hurt the defendant financially. It is to attach a stigma—pronounced by independent law courts—on the breach of legal obligations which have been imposed in the interest of the community. If a modern giant industrial concern is fined for a statutory offence, it does not normally hurt an individual. But an accumulation of such convictions will deservedly impair the standing and reputation of such a concern. Nor is there any doubt that public corporations such as the National Coal Board or the Transport Commission could be fined for statutory offences. Yet they are in substance part of the government machinery, and their finances are, in a more or less direct way, linked with government finance.[3] But there is no reason why the often merely technical difference between a government department separately incorporated as a statutory authority, and a government department which remains technically part of the Crown, should be elevated into a matter of principle. The apparent absurdity of the Crown paying a fine to itself is part of nineteenth century legal thinking applied to twentieth century conditions.

[3] Cf. 'The New Public Corporations and the Law', 10 Mod.Law Rev. 249; also 22 *Australian Law Journal*, p. 11 *et seq.*

The same applies to the further argument that the Crown could not be imprisoned. In *R.* v. *I. C. R. Haulage, Ltd.*,[4] the Court of Criminal Appeal held that an indictment for a common law conspiracy to defraud lies against a limited company. It also disagreed with the earlier decision of *R.* v. *Cory Bros.*,[5] where the court refused to indict a company whose directors had caused the death of an unemployed coalminer by charging a fence with electric current. It held that it is sufficient if a fine is at least an alternative punishment. This is strongly supported by both Winn and Welsh.[6] On the other hand, 'Where the only punishment which the Court can impose is death, penal servitude, imprisonment or whipping, or a punishment which is otherwise inappropriate to a body corporate, such as a declaration that the offender is a rogue and a vagabond, the Court will not stultify itself by embarking on a trial in which, if a verdict of Guilty is returned, no effective order by way of sentence can be made'.[7] There is no reason why these considerations should not apply to the Crown. If an Act is declared specifically applicable to the Crown, this applicability should go as far as is technically possible whether the literal or the mischief rule of statutory interpretation is applied to the construction of the statute.

All these points are, however, aspects of a wider problem. The absurd fiction that because modern government is still nominally carried out in the name of the King, the government is above the law, has at last been discarded for the sphere of civil law.[8] But, ironically enough, it is conservative legal thinking on this subject that still impedes the implementation of Dicey's principle of equality before the law. The only reason for differentiating between civil and criminal liability would be that an imposition of criminal liability upon the Crown would offend against elementary principles of constitutional law and public policy. This leads us to a distinction of two types of criminal law which is becoming more and more important. The common law type of criminal offences, from murder to larceny, which demands a mens rea, still dominates the textbooks, but a type of criminal offence which is mainly administrative in character and does not involve a moral stigma is steadily gaining in importance. This kind of statutory offence is essentially an instrument of government, a formalised protection of social welfare provisions. Safety or health provisions in factories, purity of foodstuffs or beverages for sale, compliance with directions on price control, standards of production, or building restrictions, are some of the innumerable illustrations of this growing branch of administrative penal law, which the last war in particular has made familiar

[4] [1944] K.B. 551.
[5] [1927] 1 K.B. 810.
[6] See note 2, above.
[7] Welsh, *loc. cit.*, p. 363.
[8] British Crown Proceedings Act, 1947.

to thousands. On the Continent this has long been known as ' Verwaltungsstrafrecht '. American authors have recently introduced a corresponding category called ' public welfare offences '.[9] Liability for such offences is normally strict. It is designed to ensure a standard of conduct in the social interest rather than to punish a state of mind of the individual. As long ago as 1846, an English court held a retail dealer guilty of having adulterated tobacco, although he neither knew nor had any reason to suspect it was adulterated.[10] Since then, the range of strict statutory offences has widened immensely. It includes the sale of food, liquor and narcotics, traffic offences, building regulations, safety devices in mines, factories, docks, and a multitude of other activities closely connected with public order and social welfare. As Hall points out, these public welfare statutes represent ' relatively recent adaptations to an intricate economy ', and ' their occurrence does not arouse the resentment that characterises the effective attitudes directed at the perpetrators of traditional crimes '. There is nothing shocking in the suggestion that the Crown—whether it acts through a government department or through a separate corporation—should be subject to this type of penal liability. The public policy which has led to the constitution of an increasing number of government activities in the form of public corporations, fully liable in public and private law, and as nearly as possible on the same footing as a private individual, applies with equal force to liability for statutory offences, which are one way of ensuring public order and the minimum of social standards in services. And just as separate budgeting, accounting, and auditing of public corporations —whether or not they are entirely financed by the government—is regarded as an essential means of ensuring efficient management and honest accountancy, so the liability of the Crown and other public authorities to fines must be seen, not as a means of making them suffer financially, but as a means of ensuring a standard of public conduct at least equal to that which the Crown demands of its subjects.[11]

[9] Sayre (1933) 33 *Columbia Law Review* 71; Hall, *Principles of Criminal Law* (1947), p. 281.

[10] *R.* v. *Woodrow* (1846) 153 Eng.Rep. 907.

[11] There is no need to go into the further question whether the Crown, like other corporations, might also be liable for criminal offences which demand a mens rea. Welsh has recently analysed the criminal liability of corporations in general, in the light of three English decisions of 1944, which have held corporate bodies liable for crimes in which a guilty state of mind was an essential element. The actions of other ' primary representatives ', *i.e.*, representatives who are organs rather than mere servants or agents of the corporations, were imputed to the bodies corporate. Both Welsh and Winn (*loc. cit.* note 2) advance powerful arguments for the general extension of criminal liability of corporations, except for a limited number of crimes such as bigamy, incest, and rape, which could not be committed by a corporation, and certain crimes which are not punishable by the infliction of a fine, at least as an alternative to a heavier penalty. The main difficulty in extending this wider criminal liability of corporate bodies to the Crown lies probably in constitutional law. As Dixon J. pointed out in *Cain* v. *Doyle* (72 C.L.R. at p. 425), ' Except in great

In *Cain* v. *Doyle*, the relevant Act had been specifically declared applicable to the Crown. The court did not, therefore, have to discuss the wider and closely related problem how far the Crown can generally be presumed to be bound by statutes. The general policy problem is the same as discussed in the first part of this article : is there any reason for the continued exemption of the State—*i.e.*, of governmental departments and of incorporated public authorities which are covered by the ' shield of the Crown ' [12]—from the binding force of statutes of general application? The desire to extend equality before the law as far as compatible with the necessary minimum of governmental and administrative discretion should, one might have thought, have led the courts to the utmost restriction of this privilege of the Crown except where overriding interests of public policy demanded its preservation. But it is not without irony that the English and Australian law courts, which have shown great sensitiveness to the growth of administrative power, and which have, sometimes in the desire to restrict it by the prerogative jurisdiction of the High Court, extended the notion of ' quasi-judicial ' to very dangerous lengths,[13] should have moved in entirely the opposite direction on the question of the binding effect of statutes on the Crown.

The textbook rules on this matter are conflicting.[14] One rule says that ' It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible '. This rule, deriving as it does from the supremacy of the King in the pre-democratic age, is of respectable antiquity.[15] But the other rule is hardly less respectable : the rule that the King is not bound unless he is specially named, or must be included by necessary implication, does not apply ' when the Act is made for the public good, the advancement of religion and justice, the prevention of fraud, or the suppression of injury and wrong; " for religion, justice, and truth are the sure supporters of the

matters of State the Crown acts only by its ministers and servants. If two or more of them knowing the facts agree upon a course of action which constitutes or involves the offence on the part of the Crown, they would then be guilty of conspiracy and punishable under s. 86 of the *Crimes Act*, and it would not matter that they were ignorant of the legal consequences of their decision and were actuated solely by a desire to serve the interests of the Commonwealth. In the same way, if the act or order were that of one Commonwealth officer only, he might be punishable under s. 5 of the *Crimes Act*. In either case, besides incurring the liability to punishment prescribed by those provisions he would be liable to dismissal from the public service, if he were subject to the Commonwealth *Public Service Act*: see s. 62 (2) '. The question is of mainly theoretical interest, and lies outside the scope of the present inquiry, which is concerned with statutory offences of an administrative and social service character.

12 On this problem see Friedmann, ' Legal Status of Incorporated Public Authorities ', 22 *Australian Law Journal* 7.

13 As, for example, in *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171.

14 Cf. Maxwell, *Interpretation of Statutes*, 9th ed., p. 141.

15 *Willon* v. *Berkeley* (1562) Plowden 236.

crowns and diadems of kings " '.[16] With the development of legislative activities the exception was either bound to swallow the rule, or the meaning of the exception had to be whittled down. Except for the dwindling number of private Acts, hardly any modern statute could fail to come under one or the other of the categories mentioned in the rule of the *Ecclesiastical Persons Case*. The last war, with its numerous defence or national security regulations, in particular those giving protection to tenants, brought the problem repeatedly before the courts. Instead of welcoming this opportunity of eliminating or at least reducing the scope of an inequality between governors and governed, perhaps even more objectionable than the now abolished privileges of the Crown in common law, the courts did the reverse. In *Att.-Gen.* v. *Hancock*,[17] Wrottesley J. held that the Crown was not bound by the Courts (Emergency Powers) Act, 1939, under which execution of judgments was not permitted without the leave of the court. He surveyed a number of previous decisions, the majority of which had declared the Crown exempt under comparable statutes. Although the learned judge, at the beginning of his judgment, clearly said that the original reason for the exemption of the King hardly applied to modern conditions, he was content to give as the main reason for his decision that ' this Act of 1939 is an Act which, if applied to the Crown, would clearly divest it of or diminish in some way, the Crown's property, interests, or rights '. If, in *Hancock's Case*, it could at least be said that the recovery of income tax arrears was a public interest, weighing more heavily than the war-time protection of debtors, such considerations do not apply to the later decisions. In *Re Hutley's Legal Charge*,[18] recovery of possession of mortgaged farm land by the Public Works Loan Commissioners was the issue. In *Minister of Works* (*W. A.*) v. *Gulson*,[19] the Australian High Court was concerned with the ejectment of a tenant, a sergeant of police, from premises held on a weekly tenancy, and let to him by the Minister for Works under the Public Works Act. By a majority, the court held that the National Security (Landlord and Tenant) Regulations did not bind the Crown.[20] It is, however, the most authoritative of the recent decisions on this point which is also the most objectionable. In *Province of Bombay* v. *Municipal Corporation of Bombay*,[21] the Privy Council held that an Act of the City of Bombay which gave it power to carry municipal drains through certain streets, roads, and land, did not bind the Province of Bombay, then a part of the

[16] *Case of the Ecclesiastical Persons* (1601) 5 Rep. 14a; *Magdalen College Case* (1616) 11 Rep. 70b, 73a; *R.* v. *Armagh (Archbp.)* (1722) Stra. 516; Bac.Ab. Prerogative (E) 5.

[17] *Att.-Gen.* v. *Hancock* [1940] 1 K.B. 427.

[18] [1941] Ch. 369.

[19] [1944] Argus L.R. 349.

[20] Similar decisions have been given under the English Rent Acts: see, *e.g.*, *London County Territorial and Auxiliary Forces Association* v. *Nichols* [1949] 1 K.B. 35.

[21] [1947] A.C. 58.

Crown. The judgment, which was delivered by Lord du Parcq, had little more to say in support of its decision than 'that to interpret the principle'—*i.e.*, that the Crown cannot be held to be bound by statutes enacted for the public—'in the sense put on it by the High Court would be to whittle it down, and they could not find any authority which gives support to such an interpretation'.

When faced with conflicting or ambiguous rules, the courts have frequently recourse to considerations of public policy or general justice, sometimes in situations far more dubious than the present one.[22] It is difficult to understand why they have so conspicuously missed an opportunity of moulding the law in accordance with principles of legal policy which are above party controversy.[23] Socialists may regard the reduction of Crown immunities and prerogatives as a price to be paid for the socialisation of industries and other extensions of governmental activity in the planned State; Conservatives may regard it as a necessary safeguard for the citizen against the arbitrary encroachments of bureaucracy, and as a guarantee for fair competition between public and private enterprise. But both philosophies arrive at the same conclusion. Why should a government department which owns land be exempt from an obligation to lay drains which serve agricultural or sanitary purposes? Why should a State housing commission be exempt from the building regulations of a local authority?[24] The ordinary citizen is bound to feel resentment against such differentiations. Thanks to the line taken by the courts, he may come to regard the State as landlord with particular apprehension. Again, it is hardly encouraging for local authorities to watch government departments, or any other public authorities protected by the 'shield of the Crown', flouting the standards or obstructing the services which the local authorities are developing within their sphere. Nor are the decisions based on any contrary legal philosophy or policy. They are distinguished by the absence of any guiding principles. Such a guiding principle may well be derived from a version of the traditional rule as adopted in *Craies on Statutes*[24a] from various older sources and repeatedly used by Australian courts.[24b] It says

[22] For a survey of decisions and developments see Friedmann, *Legal Theory*, 2nd ed., Chap. 23, especially pp. 285–305.

[23] The British Crown Proceedings Act, 1947, for example, was supported by all parties.

[24] Such was the decision of the Supreme Court of N.S.W. in *N. Sydney Council* v. *Housing Commission*, 48 S.R. (N.S.W.) 282 (1948). The decision followed the *Bombay Case*. On the other hand, the Victorian Supreme Court, in *Victorian Railway Commissioners* v. *Herbert* [1949] Argus L.R. 440, held railways commissioners bound by the Landlord and Tenant Act, 1948 (Victoria), on the ground that, in so far as they owned and let property, they were not exercising a governmental function, and thus were not 'under the shield of the Crown' (cf. *Tamlin* v. *Hannaford* [1949] 2 All E.R. 327). This decision would not help, however, where a government department is a defendant.

[24a] 3rd. ed., p. 356.

[24b] The High Court in *Sydney Harbour Trust Commissioners* v. *Ryan*, 13 C.L.R. 358, used it to hold the New South Wales Government bound by the Employers'

that the King cannot be stripped by a statute, which does not specifically name him, ' of any part of his ancient prerogative, or of those rights which are incommunicable and are appropriated to him as essential to his regal capacity '. On the other hand, a statute may, without naming him, deprive him ' of such inferior rights as belong indifferently to the King or to a subject, such as the title to an advowson or a landed estate '. Translated into modern terms, this means that the presumption should be against a statute binding the Crown where it would interfere with the governmental functions outlined by the Prerogatives (notably Military Affairs, Foreign Affairs, Treaty-making Power) but that the presumption should be the other way where the statute concerns activities which put the Crown on the level of other individuals, that is to say, industrial, commercial and managerial activities. Such a rule would combine historical continuity with an intelligent interpretation of the many new activities of the State. It would constitute an acceptable compromise—for the guidance of Parliament as well as of the courts—between the preservation of governmental freedom of action in certain spheres and the submission of the State to the rule of law, where it is compatible with and indeed demanded by the public interest.

Both problems discussed in this article—that of penal liability of the Crown, and that of the binding force of statutes—point to the need for a more articulate theory of State. The historic continuity of the development from the absolute monarchy to modern constitutional democracy, as well as the disinclination of British jurisprudence to formulate general theories of law, has been in the way of such a development. But as with the problem of administrative justice, the absence of articulate thinking now threatens the proper functioning of the machinery of justice.

Continental theory has long known the dual aspect of the State, as sovereign and as fiscus. It has been compelled to think about the problem mainly because of the need to adjust the jurisdictions of the civil courts and the administrative tribunals. Continental legal theory and practice is by no means unanimous as to the proper solution. The French distinction, for example, between *gestion publique* and *gestion privée*, attempts to make the nature of the service the distinguishing test. It is of course never easy to draw an exact borderline between predominatingly administrative and predominatingly civil functions and activities of public authority. However, French jurisdiction has worked out reasonably satisfactory practical tests. The adoption of common forms of contract, for example, or of other transactions developed by civil law, such as

Liability Act; the Supreme Court of Victoria, in *R.* v. *Hay* [1924] V.L.R. 97, used it to hold the Crown bound by the Statute of Frauds. Unfortunately, the majority of the High Court took a more narrow view in the recent case of *Minister for Works* (*W.A.*) v. *Gulson*, where Williams J. was content to say that the principle of Crown immunity clearly applied to all property vested in the Crown.

employment, transport, etc., indicates a *gestion privée* rather than a *gestion publique*, and consequently indicates civil instead of administrative jurisdiction.[25] In view of the high competence and legal independence of administrative tribunals, which in many cases have given more protection to the citizen than the civil courts,[26] the citizen is not greatly affected by the distinction. A nearer analogy to the problems of the common law systems may be found in the doctrine of State immunity in international law. The increasing commercial activities of States have made the traditional principle of immunity of ships owned by foreign States under their own jurisdiction out of date and unjust in its application. Characteristically, most Continental courts have attempted to restrict the immunity of States by distinguishing between the different types of State activities. But British and American courts have refused to modify traditional principles, though hardly out of any particular sympathy with socialism or State interference in commercial matters. The Continental courts have experimented with three different solutions[27]: the first makes the *form* of the transaction decide; Belgian and Italian courts in particular hold the State liable when it concludes a contract, for example, when Army authorities buy shoes, or bullets. Requisitions, on the other hand, are held to be acts of sovereignty and immune from jurisdiction. This test is satisfactory enough for most cases, but it does not solve situations such as that discussed in the case of *Rederiaktiebolaget Amphitrite* v. *R.* (1921),[28] where the promise of the British Government to release a Swedish ship when she had entered a British port, was held not to be of a contractual nature. Nor does the test provide a solution where the government may be liable for negligence or other torts. The second solution distinguishes between sovereign and non-sovereign, or public and non-public, functions of the State. This is very close to the distinction between 'government' and 'non-governmental' functions, which is responsible for so much confusion in British and American law, and which should now be abandoned as bad in theory and unworkable in practice, for it is impossible to achieve any generally acceptable line of demarcation between 'proper' and 'improper' activities of modern governments, without adopting a specific political theory.[29]

[25] Cf. Waline, *Manuel Elementaire de Droit Administratif*, 4 ed., 1946, pp. 54–58.

[26] A prominent example is the doctrine of 'imprévision', through which the French administrative courts have developed principles of revising and adjusting contracts in the light of changed circumstances. The French civil courts still refuse to adopt this doctrine, but it has had great influence on the doctrine of frustration of contract in modern German, Swiss and Greek law. Cf. David, Cohn and Deschenaux in *Journal of Comparative Legislation and International Law*, Vol. XXVIII, pp. 11–25, and Vol. XXX, pp. 55–56; Zepos, 11 Mod. Law Rev. 36–47.

[27] Cf. in detail Allen, *The Position of Foreign States before National Courts* (1933); Niboyet, *Revue générale de droit international public*, Vol. XLIII, p. 525 (1936).

[28] [1921] 3 K.B. 500.

[29] For a detailed discussion of this problem, see Friedmann, 'Legal Status of Incorporated Public Authorities' (1948) 22 A.L.J. 7.

There remains the functional test. Whether or not a State is immune from jurisdiction and liability should depend on the nature of the particular activity. This is a test adopted by the nine nations which signed the Brussels Convention of 1926 [30] concerning immunities of government vessels. State-owned vessels carrying cargoes and passengers were declared under the same rules of jurisdiction and liability as private vessels, with the exception of certain specified categories comprising warships, hospital ships, and other non-commercial vessels. A parallel development is the increasing subjection of commercial inter-State transactions to private law and municipal jurisdiction.[31] In a recent discussion of the borderlines between public law and private law transactions between States, Dr. Mann concludes [32] that no single test has been evolved to distinguish the two categories. The nature of the transaction, the capacity in which the parties acted, the wording and contents of the agreement have been relied upon to determine its character. Commercial or industrial purposes, coupled with the adoption of contractual forms, will normally imply the adoption of private law and municipal jurisdiction. Recent developments in Britain and the Dominions reinforce this trend of the law. Government undertakings predominantly concerned with the conduct of industrial or business enterprise, or a comprehensive social service, have been incorporated and thus become subject to the rights and liabilities of private legal persons.[33] But as the cases discussed in this article show, numerous government activities remain which it is not practical to incorporate but which may nevertheless create acute problems of liabilities and immunities. The functional test appears to be the only possible guide. Where a government department concludes a contract for the purchase of stores; where it runs a factory operating machinery, employing clerical and technical staff; where it builds houses or treats patients in hospitals—it should be as nearly as possible in the same position as private legal individuals. To maintain that the operation of an ammunition factory, a national health service, or a railway is not the exercise of a proper government function would mean the adoption of a theory of government now rejected in the practice of every modern State. It would be little better to single out certain traditional functions, such as defence, foreign affairs, police, as being necessary aspects of sovereignty. The running of ammunition factories is an aspect of defence, but its operation is a managerial enterprise, which involves contracts of purchase and employment, and the observance of numerous statutory obligations. The broad guiding principle should be that where the industrial, commercial, or managerial aspects of

[30] Britain signed but did not ratify the Convention.
[31] Cf. in particular *R.* v. *International Trustee* [1937] A.C. 500.
[32] *Brit. Y.B. of Int. Law* (1944), p. 27.
[33] For details about Britain see 10 Mod.Law Rev. 233, 377; about Australia, 22 A.L.J. 7.

a government activity are involved, the presumption should be in favour of the application of the general law. As shown in this article, this should include statutory liabilities and penal liabilities, subject to the limitations which have been indicated. There will, of course, always be difficult borderline cases. But such difficulties occur in all branches of the law, and a problem analogous to the one under discussion here has occupied Continental jurisdiction for many years.

The conclusions reached in this article may be summed up as follows : first, it is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either direct or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental functions, but the nature and form of the activity in question. Secondly, a large proportion of modern statutory offences is mainly administrative in character, designed to ensure the maintenance of minimum standards of public life and social services. Penal liability for breaches is usually strict, as it increasingly affects corporate bodies, and its main purpose is not financial punishment but social stigma. There is thus no reason why the Crown should not be subject to fines for such statutory offences. Thirdly, the rule that the Crown is not bound by statute except when specifically mentioned or by necessary implication, is socially and politically objectionable, nor is it legally compelling. It is the exception to the rule which should be developed by the courts, not the rule itself. The application of the rule should be limited to such cases where an overwhelming public interest demands that the Crown should be exempt.

Lastly, all these problems underline the necessity of a more articulate theory of State in modern British law.

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MEASURE OF DAMAGES IN CONTRACT AND TORT—LAW AND FACT

Since the two recent decisions in *Monarch S.S. Co.* v. *Karlshamns Oljefabriker* (*A/B*) [1949] A.C. 196 (on which see 12 M.L.R. 372) and *Victoria Laundry* (*Windsor*) *Ltd.* v. *Newman* (1949) 65 T.L.R. 274; [1949] 2 K.B. 528: the proper interpretation of the two rules in *Hadley* v. *Baxendale* (1854) 9 Ex. 354 may be taken to be settled. The first rule is, it appears, to be contrasted with the 'direct consequence' rule adopted for torts by the decision in the *Polemis Case* [1921] 3 K.B. 560, as a subjective rule based upon 'reasonable foresight'. Professor Goodhart's view ((1949) 65 L.Q.R. 139) that the effect of the *Karlshamns Case* is to bring the rule for torts into line with the contract rule does not seem to be borne out by a fair reading of Lord Wright's speech upon which the learned Professor relies: even if Lord Wright had intended to show disapproval of the *Polemis* Rule his remarks would anyhow only have carried the weight of obiter dicta. The second rule in *Hadley* v. *Baxendale* is, it seems, to be treated as an application of the first to special circumstances: what would not, in the ordinary course of events, fall within the orbit of 'contemplation' may sometimes be held to have done so where, due to peculiar circumstances, a particular defendant may be taken to have foreseen special and peculiar consequences. Broadly, and for the moment uncritically, stated, these are the rules.

The *Karlshamns Case*, then, supported by the *Newman Case*, has at last given us an authoritative statement of this branch of the law. Lord Wright's speech will, however, be further remembered for the following dictum which he let fall; 'Remoteness of damage', he remarked, 'is in truth a question of fact' ([1949] A.C. at p. 223). It is submitted with respect that this is a very important statement. Whatever rules may be laid down for the general direction of courts or the general direction of juries on the issue of damages, the actual decision, since it turns upon the 'cause of causes and the consequence of consequences' must always depend very largely upon the facts. It is indeed worthy of note that damages at common law were always a 'jury' question (see (1931) 47 L.Q.R. 345: (1932) 48 L.Q.R. 90), and it was only when the findings of juries became subject to review by appellate courts that any 'rules' were formulated. A very neat illustration of the difficulty of *applying* the first rule has, as it happens, arisen very shortly after the *Karlshamns* decision. In *Collins* v. *Howard* [1949] 1 All E.R. 507 (in C.A. (1949) 208 L.T. 59: [1949] 2 All

E.R. 324) the facts were as follows. A agreed with B to provide capital for the formation of a limited company which was to exploit for building purposes a certain material called 'lignarite' which B had invented. Unknown to B, A, in order to provide the necessary funds, disposed of a certain block of Argentine Railway shares which he held. B, in breach of contract, refused to go through with the formation of the company, and A thereupon bought an equal number of shares in the same company to replace the shares he had sold. Between the time of sale and the time of repurchase the market had risen: A therefore paid £245 more on repurchase than he had received on the sale. In an action for breach of contract A sought to recover this £245 from B. In the court of first instance Humphreys J. analysed the situation thus: 'There are certain contracts, such as contracts for the sale of land, in which, for special reasons, damages are strictly limited (*Flureau* v. *Thornhill* (1776) 2 W.M.Bl. 1078; *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158). This is not such an exceptional case: here the defendant could reasonably contemplate that if he broke his contract and it happened that the plaintiff had sold shares, he would, as a reasonable man, acting to mitigate his loss, repurchase similar shares: the possibility of a market fluctuation, hence the actual loss, was something which a reasonable man in the defendant's position might have anticipated'. Hence the learned judge held that the £245 was recoverable. This seemed, with respect, an eminently reasonable view. The case, however, came up on appeal, and the Court of Appeal reversed this decision ([1949] 2 All E.R. 324). They held that the contract was in essence a contract to *buy* shares in the new company, not a contract by which A agreed to sell B the Argentine Railway shares. Hence A's dealings with these latter shares were a matter which could not be said to 'arise naturally' from the contract itself, they were quite independent of it; there being no 'special circumstances' from which knowledge of them could be imputed to B, B could not be held responsible for the loss. This too seems an eminently reasonable and satisfactory way of looking at the matter, but it results in a reversal of the decision. It would be interesting to know whether the House of Lords would adopt either of these views or whether they would pronounce yet a third interpretation of the facts. It is submitted that the lesson that one learns from this story is the lesson propounded by Lord Wright: the 'tests'—whether 'foresight', 'direct consequence' or what you will—only give an initial bias or impetus to the decision, once launched in the direction of that impetus the court turns juryman, and jurymen have a very wide discretion in the selection of significant facts.

Collins v. *Howard* then illustrates the proposition that in the law of damages the application of legal rules is more important than the rules themselves; so perhaps criticism of the rules is not a

matter of very great moment. It is, however, hard to refrain from making a few comments upon the contract rules as they now stand.

First, it is conceived that the reason why the courts tend to treat the contract-breaker more leniently in the matter of damages than they treat the tortfeasor—subjecting the former to a 'subjective', the latter to an 'objective' test—is not a reason of very respectable parentage. It is believed that there is a tendency to favour the contract-breaker because it is felt that since the *formation* of contract depends (or is said to depend) upon 'consensus', it should follow that *liability* for breach should be limited by 'consensus'. In tort all is different, the wicked tortfeasor should suffer for his wrongdoing. Now, in respect of the tortfeasor there is a grain of truth in this; despite the efforts of text-book writers to limit the aim of tort to compensation, punitive damages may be, and constantly are, awarded in tort. On the other hand, in respect of contract this attitude is clearly unsound. In the first place, the 'consensual' theory of contract is only one of many theories, its ascendancy in modern text-books is probably traceable to the influence of continental analytical jurisprudence. Many contracts can be concluded without 'consensus', for instance, contracts under seal; further, much of the 'consensus', is often supplied not by the parties, but by the court itself, *e.g.*, the '*ticket cases*' and the ever-expanding classes of case in which the court is willing to 'imply' terms. So much is this latter proposition true that one often feels that the Law of Contract is in reality the set of rules applied by the courts to implement the *absence* of consent. Further, even if it be accepted as axiomatic that 'consensus' is the hall-mark of the law relating to the *formation* of contract there is no reason why it should have any application in the law relating to *breach* of contract. Traditionally the English law of contract has, after all, been the law of *breach* of contract; *assumpsit* was in origin a tortious action. Why then should the contract-breaker receive milder treatment than the defamer? It seems strange, too, that at a time when in other branches of the law of contract the courts are tending to adopt 'objective' standards they should revert to the 'subjective' in relation to damages. Reference to 'implied intention' no longer finds favour in the fields of frustration and quasi-contract. (See particularly the speeches of Viscount Simon L.C. and Lord Wright in the *Fibrosa Case* [1943] A.C. 32.)

It is, perhaps, a pity that the Judicial Committee decision in *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co.* (1924) 41 T.L.R. 21 has not been cited more often in the courts. It was a contract case, almost as striking in its facts as the *Polemis Case* in tort; and it was decided, by interpretation of Alderson B.'s magic word 'naturally', in the same sense. It appears unfortunately not to have been relied upon in the *Karlshamns Case*; had

it been, perhaps the law would have been different and, it is conceived, more rational, today.

Finally, it seems, since the *Karlshamns Case*, that a method of stating the second rule in *Hadley* v. *Baxendale* has now found favour which does much to negative the effect of it. In cases 'where there were special circumstances beyond the reasonable prevision of the parties . . . it is laid down that the special facts must be communicated by and between the parties . . . if they are not communicated it would not be fair . . . to hold the defendant responsible'. (*Per* Lord Wright [1949] A.C. at p. 221.) That is to say, nothing far short of contracting upon the terms of accepting liability in respect of the peculiar consequences is likely to render the defendant responsible for their results. The origin of this rule is, it seems, to be found in nineteenth century cases involving common carrier defendants; in these cases it was felt that one who *had* to accept a contract of affreightment ought not in fairness to be forced to subject himself to peculiar responsibilities unless he could be in a position to make a contract upon special terms (see, *e.g.*, *British Columbia Sawmills Co.* v. *Nettleship* (1872) L.R. 7 C.P. 583, *per* Keating J., p. 591; and on appeal (1873) L.R. 8 C.P. 136 *per* Kelly C.B., p. 139). Some may consider that it is to be deplored that a rule introduced from a sense of tenderness to a special class of defendant should have become a part of the general law. As the law is now to be stated it means, in effect, that Rules I and II in *Hadley* v. *Baxendale* are only alternative ways of stating the same proposition.

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THE APPLICATION OF ENACTMENTS WITHIN ENGLISH TERRITORIAL WATERS

The Borough of Seaville stands upon the shores of the English Channel, not in any bay or arm of the sea. The Seaville pier extends for 300 yards out to sea beyond low-water mark and on the seaward end of the pier is situate a confectioner's shop. One day the confectioner commits a summary offence against the Food and Drugs Act, for which offence he is duly summoned before the Borough Magistrates. He raises two defences :

(1) An Act of Parliament which creates summary offences does not apply beyond low-water mark of the sea; and

(2) The Borough Magistrates have no jurisdiction to deal with summary offences committed beyond low-water mark in the absence of express statutory provisions so authorising them.

The defences raised are based on *R.* v. *Keyn* (2 Ex.D. 63) (in which it is decided *inter alia* that no part of the sea beyond low-water mark is within the body of any English county) and *Blackpool Pier Co.* v. *Fylde Union* (41 J. P. 344) (in which it was held that so much of a pier as lay beyond low-water mark was not part of the adjoining parish for civil parochial purposes but was beyond the realm of England). Before considering further these cases, it is desirable to consider some of the earlier statutes and decisions; most of them will be found to have been discussed in the 175 pages of the judgments in *R.* v. *Keyn* (*supra*).

The statutes 13 Ric. 2, c. 5 and 15 Ric. 2, c. 3, declare that the Admiral shall not meddle thenceforth within the realm of England but only with things done upon the sea and that the court of the Admiral has no manner of cognisance, power or jurisdiction of anything done or rising within the bodies of counties either by land or water, but all such things rising within the bodies of counties shall be tried and determined by the laws of the land and not by the Admiral. According to Lush J. (*Keyn* at p. 239) and Cockburn C.J. (*Keyn* at p. 168), in the time of Richard II the realm consisted of land within the body of counties and all beyond low-water mark was part of the high seas.

In *R.* v. *49 Casks of Brandy* (3 Hag.Adm.Rep. 247) Sir John Nichol observed that no one ever heard of a land jurisdiction of a body of a county which extended three miles from the coast.

In *The Leda* (Sw.Adm. 42) it was held, on the construction of the Merchant Shipping Act, 1854, s. 460, that the limits of 'the United Kingdom' included its land and three miles from its shore. This would seem at first blush to deal a fatal blow at our confectioner's contention. It is argued, however, that the very fact that

the area of the 'United Kingdom' was in doubt shows that it was by no means clear whether territorial waters would invariably be included in the 'United Kingdom'. Also, as the case turned on the construction of a Merchant Shipping Act, obviously terms in it would be construed to include places where ships normally go. It is not, it is submitted, an authority for saying that every Act of Parliament, whether it affects ships or not, applies to territorial waters.

In *General Iron Screw Colliery Co.* v. *Schurmanns* (1 J. & H. 180), a case of limitation of liability under a Merchant Shipping Act, Wood V.-C. stated that there could be no possible doubt that the water below low-water mark is part of the high seas, but that for certain purposes every country may legitimately exercise jurisdiction over so much of the sea as is within three miles. Cockburn C.J. (*Keyn* at p. 224) observed that this was far from saying that the sea in question without the intervention of the Legislature is to be taken to be the territory of the local State for all purposes whatsoever, so that, independently of legislation, the local law will apply universally within it.

That the question whether an Act normally extends to territorial waters is open to doubt appears also from section 2 of the Foreign Enlistment Act, 1870, which declares that it shall extend to all the dominions of the sovereign, including the adjacent territorial waters. Further, section 61 of the Licensing Act, 1872, provided that for all the purposes of the Act any pier, quay, etc., extending from any place within the jurisdiction of any licensing justices or magistrates' court into or over any part of the sea should be deemed to be within such jurisdiction. Section 2 of 21 & 22 Vict. c. 109, refers to mines below low-water mark, 'adjacent to but not part of the county of Cornwall'.

In *R.* v. *Keyn* (*supra*), a German vessel (the *Franconia*), by criminal negligence of the German master collided with a British ship causing the death of a person on the latter ship. The collision took place off Dover less than three miles from the Kentish shore. He was indicted at the Central Criminal Court (and not at Kent Assizes) for manslaughter on the high seas and within the jurisdiction of the Admiral. His conviction was quashed by the Court of Crown Cases Reserved by a majority of seven to six. The main question in the case was whether there is jurisdiction over foreigners within the three-mile limit. It was held by the majority that there was no such jurisdiction over foreigners on foreign ships in the absence of statutory enactment. The question whether an Act bound British subjects not on British ships within such limit was not specifically considered. It was not doubted, however, by Cockburn C.J., who was of the majority, that Parliament could legislate so as to extend English law over territorial waters, and he cited the Customs Consolidation Act, 1876, s. 179, as an example. He, Sir R. Phillimore and Lush J. stated categorically that the

body of a county extends only to low-water mark and that all beyond is the high seas, but they do not go so far as to say that English law does not extend to Englishmen beyond low-water mark. That proposition the majority neither affirmed nor denied, being concerned with a foreigner on a foreign ship. The minority, however, held that the sea within three miles of the coast is part of the territory of England, that the English criminal law extends over those limits and that the Admiral has jurisdiction to try offences by foreigners on foreign ships there. Brett J.A., of the minority, stated at p. 144 that every enactment of English law, common law or statute law, not confined to a less area by express words or necessary inference, is as law applicable to the water territory of England (*i.e.*, within the three-mile limit), just as much as to the land territory. He further stated that the open sea (*i.e.*, beyond low-water mark) is within no county and that the common law courts never had jurisdiction under the common law to try crimes there committed, even though committed by Englishmen (p. 145), but that the Central Criminal Court, as transferee of the Admiral's jurisdiction, may try offences committed by Englishmen or foreigners in any ship, British or foreign, within three miles of the English shore. Coleridge C.J. at p. 158 likewise agreed that the law over such part of the sea could not be administered by the judges of Oyer and Terminer but could be administered by the Admiral. The majority and minority seemed to be agreed that the sea beyond low-water mark is not part of a county and that offences by Englishmen beyond such mark are within the jurisdiction of the Admiral. None of the judges suggested that Keyn should have been tried at Kent Assizes on the ground that the crime had been committed in Kent.

The judgment of Cockburn C.J. runs to eighty pages and the other judgments are also long. Numerous writers were cited in support by each side (and sometimes by both sides) as were other decisions besides those referred to above. *Free Fishers of Whitstable* v. *Gann* (11 C.B. (N.S.) 387) was cited by the minority, for example, as showing that the soil of the sea shore to the extent of three miles from the beach is vested in the Crown. Some of the opinions cited also suggested that the jurisdiction up to the three-mile limit was for certain purposes only, *e.g.*, customs and protecting English shores from insult from foreigners.

Two months after *R.* v. *Keyn* had been decided, the case of *Blackpool Pier Co.* v. *Fylde Union* (41 J.P. 344) came before a court consisting of two judges who had been of the minority in *R.* v. *Keyn*. In this case it was held that so much of a pier as was beyond low-water mark was not rateable and that section 27 of the Poor Law Amendment Act, 1868 (which declared that every accretion from the sea, whether natural or artificial, should be annexed to and incorporated with the adjoining parish for all civil parochial purposes) did not apply, the pier not being an

accretion. Coleridge C.J., after referring to *R.* v. *Keyn*, declared in his judgment that the part of the pier beyond low-water mark was 'beyond the realm of England' and 'out of the realm'. Grove J. said that it was 'out of the jurisdiction of the realm of England'.

Nine months after the judgments in *R.* v. *Keyn* had been delivered, the Territorial Waters Jurisdiction Act, 1878, received the Royal Assent. The preamble declares as follows:

> 'Whereas the rightful jurisdiction of (the Sovereign) extends and has always extended over the open seas adjacent to the coast of the United Kingdom (and of the dominions) to such distance as is necessary for the defence and security of such dominions; and whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom (and dominions) by whomsoever committed should be dealt with according to law.'

The Act then goes on to deal with indictable offences only and summary offences are not touched by any of its seven sections. Section 2 provides that an indictable offence committed by a person, whether a British subject or not, on the open sea within the territorial waters of H.M. Dominions is an offence within the jurisdiction of the Admiral, and section 7 that any part of the open sea within one marine league measured from low-water mark should be deemed to be open sea within such territorial waters.

There has been little from Parliament or the courts since 1878 to help on this matter. In *Fitzharding* v. *Purcell* ([1908] 2 Ch. 166) it was stated that the bed of the sea below low-water mark is prima facie vested in the Crown, and *Halsbury* (Hailsham ed.), Vol. 33, p. 520, states that the soil of the sea between low-water mark and so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown is claimed as its property although outside the realm. The editor of *Halsbury* refers, however, to *R.* v. *Keyn* (*supra*) as laying down a contrary proposition and in *Att.-Gen. for British Columbia* v. *Att.-Gen. for Canada* ([1914] A.C. 157) the Privy Council treated the conflict of opinion in *R.* v. *Keyn* as unsettled and refused to pronounce on the question whether the shore below low-water mark to a point three miles out forms part of the Crown's territory.

The Licensing (Consolidation) Act, 1910, s. 107 (1), is in like terms to section 61 of the Licensing Act, 1872 (repealed), providing that for all the purposes of the Licensing Acts, 1828 (to 1934), any pier, etc., extending into or over any part of the sea shall be deemed to be within the jurisdiction of the licensing justices or magistrates' court which it adjoins.

In *Barwick* v. *S. E. Ry.* ([1920] 2 K.B. 387; [1921] 1 K.B. 187, C.A.) the *Blackpool Pier Case* was discussed. *Barwick's Case* dealt with an area of eleven acres reclaimed and walled off from the sea and is irrelevant to the subject now under consideration.

Darling J., referring to the *Blackpool Pier Case*, said that the land under Blackpool Pier was as much part of the sea as the middle of the Atlantic and that the only relation it bore to the realm of England was that it was within the three-mile limit and 'therefore within territorial jurisdiction for certain purposes' (which he did not specify). He later said that putting up a number of posts on which the pier was supported was no more extending the realm than anchoring a ship over the same place would have been and that was what the two judges in the *Blackpool Pier Case* alluded to in saying that the pier was outside the realm. In the Court of Appeal only Scrutton L.J. referred to the *Blackpool Pier Case*, treating it as good law. It was suggested, however, that a stone jetty might be an 'accretion' where a pier on posts was not.

Section 27 of the Poor Law Amendment Act, 1868 (as to accretions from the sea) has now been replaced, with irrelevant modifications, by section 144 of the Local Government Act, 1933.

The Wireless Telegraphy Act, 1949, is a very recent example of a statute expressly referring to territorial waters. Section 6 (1) declares that certain sections (which create only summary offences) 'shall apply to all (wireless) stations and apparatus in or over . . . the United Kingdom or the territorial waters adjacent thereto'; section 6 (2) makes provision as to foreign ships and aircraft in such territorial waters. It would seem that the draftsman of the Act was of the opinion that it would not apply beyond low-water mark in the absence of an express provision. The Act does not, however, contain any section authorising magistrates' courts to deal with offences in territorial waters except that offences on ships and British aircraft may anyhow be dealt with pursuant to the Merchant Shipping Act, 1894, s. 685, and the Air Navigation Act, 1920, s. 14.

The relevant statutes and cases dealing with our confectioner's contention that enactments do not normally apply beyond low-water mark have now been examined, apart from some dealt with in the judgments in *R.* v. *Keyn*. The Food and Drugs Act, 1938, contains no provisions as to territorial waters or piers and declares, in section 80, that all offences under it may be prosecuted under the Summary Jurisdiction Acts.

Let us now see what the modern textbook writers have to say. Some have nothing to say on this question at all, but *Ryde on Rating* (8th ed. at p. 522), *Halsbury* (Hailsham ed.) Vol. 33, p. 545, and *Coulson and Forbes on the Law of Waters and Land Drainage* (1933 ed., chap. 1) all refer to the *Blackpool Pier Case* as being still of validity. Indeed, of course, no judge in *Barwick's Case* (*supra*) suggested that it was not still good law.

Halsbury (Hailsham ed.) Vol. 9, p. 69, states:

> 'A statute, unless its provisions show a contrary intention, applies only to the United Kingdom and acts made criminal

by it, in the absence of provisions to the contrary, are only criminal if done within the United Kingdom.'

The term 'United Kingdom' is not defined and the position as to the three-mile limit not discussed. At p. 56 of the same volume it is stated :

> 'At common law, the exercise of criminal jurisdiction is limited to crimes within the land of England with its ports and harbours, bays, gulfs and estuaries and so much of the outer coasts as extends to low-water mark. With regard to acts done outside those limits there was no jurisdiction at common law.'

The learned author of *Coulson and Forbes* lays down these propositions :

(1) By international law the Crown has all necessary powers of protection and self-defence in territorial waters over subjects and foreigners alike;
(2) The realm of England only extends to low-water mark and all beyond is the high seas;
(3) International law concedes extension of dominion evidenced by treaty or long usage. The concession cannot extend the realm of England so as to make the conceded portion liable to the common law or to vest soil in the Crown. This must be done by Act of Parliament. ('Common law' here seems to mean the law common to the realm rather than judge-made law as opposed to statute law.)

In *Maxwell on the Interpretation of Statutes* (8th ed.) at p. 127, it is stated :

> 'The presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom.'

At p. 126 it is stated that the laws of England apply within its territories including 'its ports and waters which form part of the adjacent county'. (The 8th ed. puts 'country' for 'county' but, to judge from earlier editions and from the context, 'county' is correct.)

These writers seem to support the confectioner's contention. A contrary view is found in *Oppenheim's International Law*, 7th ed., Vol. 1, at p. 44 :

> 'If, for instance, the municipal law of a state does not by a statute extend its jurisdiction over its maritime belt, its court ought to presume that, since by the law of nations the jurisdiction of a state does extend over its maritime belt, their sovereign has tacitly consented to that wider range of jurisdiction.'

The editor then refers to *R.* v. *Keyn* but it may be said, with respect, that this case does not uphold the proposition stated. If anything, it upholds the opposite contention.

The opinion is sometimes given that the Territorial Waters Jurisdiction Act has declared the minority opinion in *R.* v. *Keyn* to be right. Whatever may be the position as to indictable offences, it is by no means clear that, by virtue of the preamble, all the laws of England are now effective in territorial waters, even though they create only summary offences or no offences. The preamble declared that the sovereign's 'jurisdiction'—not the 'enactments of Parliament' or 'the laws of England'—extends beyond low-water mark. The preamble, it is submitted, is thus too vaguely worded to justify the conclusion that the laws of England apply beyond low-water mark, and indeed such a proposition would be in contradiction of the *Blackpool Pier* decision, so far as the Rating and Valuation Act is concerned. The Privy Council, as stated, treated the conflict of opinion in *R.* v. *Keyn* as unsettled and the editor of *Coulson and Forbes* states his opinion that the 'common law' does not extend beyond low-water mark. The editor of *Maxwell* seems to imply also that statutes do not normally extend to territorial waters. In opposition, there is the cited opinion of Oppenheim, limited anyhow to 'jurisdiction'.

It seems, therefore, that it is very much open to doubt whether Acts of Parliament apply beyond low-water mark, if they do not create indictable offences or do not expressly state or necessarily imply that they so extend. Section 107 of the Licensing (Consolidation) Act, 1910 (*supra*), is an example of an Act expressly made so to apply and the Harbours, Docks and Piers Clauses Act, 1847, one of necessary implication. Indictable offences also seem, by necessary implication from section 2 of the Territorial Waters Jurisdiction Act, to be punishable if committed within territorial waters. Halsbury, it is true, is of the opinion that this Act only applies to offences committed on board ship, but the writer takes the view that the Act is widely enough drafted to cover indictable offences committed by persons on piers or swimming in the sea. The term 'indictable offence' is here used to mean any offence which is not punishable on summary conviction only but does not include any offence for which the accused and only the accused may claim trial by jury under section 17 of the Summary Jurisdiction Act, 1879.

Assuming, however, that the prosecution are able to persuade the Seaville Bench that the Food and Drugs Act does apply to their pier, there is still the confectioner's objection to jurisdiction. It is based on these propositions :—

(1) The offence was committed outside the county and borough for which the Seaville Magistrates act and upon the high seas. Summary offences (unless otherwise provided) must be tried where they were committed and the Food and Drugs Act contains (with irrelevant exceptions) no provision authorising an offence under it to be tried elsewhere than where it was committed;

(2) The offence was committed on the high seas and therefore

within the jurisdiction of the Admiral (*R.* v. *Keyn*). The Admiral's jurisdiction has, by statute, been transferred to the Central Criminal Court (Central Criminal Court Act, 1834) to Assizes (Admiralty Offences Act, 1844) and, in the case of certain indictable offences under the Criminal Law consolidation Acts of 1861, to Quarter Sessions (*R.* v. *Devon JJ.* [1924] 1 K.B. 503). His jurisdiction in respect of summary offences (if he ever had it) has never been expressly transferred to magistrates' courts and the superior courts cannot try on indictment an offence expressed by statute to be triable summarily only (*R.* v. *Kakelo* [1923] 2 K.B. 793). The Merchant Shipping Act, 1894, is here irrelevant.

Therefore, the confectioner will argue, the offence having been committed on the high seas, it is out of the magistrates' area of jurisdiction and the jurisdiction (if any) of the Admiral in respect of the offence has not been transferred to them. Only if there is some statute giving jurisdiction to the Seaville Magistrates can they deal with it.

To this the prosecution can reply that there is (in their view) such a statute. Section 2 of the Indictable Offences Act, 1848, provides that in all cases of indictable offences or ' offences of any kind or nature whatsoever committed on the high seas ' any justice for the county or other place where the offender is or resides may issue process for him to appear before that Bench and ' to be further dealt with according to law '. Our confectioner resides in Seaville. As there is power to summon or arrest the offender for a non-indictable offence, he can only be ' further dealt with according to law ' under the statutes relating to his offence which, as we have seen, are the Summary Jurisdiction Acts. It would therefore be contended that our confectioner may be dealt with by the Seaville magistrates, as he has committed an offence which is within their jurisdiction by virtue of the cited section.

The answer of the defence to this would be that the section is concerned with the issue of process only and not with conferring jurisdiction; it would only apply if there was already some statute giving them jurisdiction in respect of summary offences on the high seas. It certainly seems unlikely that the draftsman of the section had any such point as that now under consideration in mind, especially as an Act dealing with summary jurisdiction was passed in the same year.

It therefore seems very much open to doubt whether magistrates may deal with a summary offence committed beyond low-water mark (otherwise than on a ship or British aircraft) in the absence of an express statutory provision.

Section 46 (2) of the Summary Jurisdiction Act, 1879, is not in point. It declares that an offence within 500 yards of the

boundary of the jurisdiction of 'two or more courts of summary jurisdiction' may be tried by any one of such courts. Here, however, there is only one court of summary jurisdiction, not 'two or more'.

The proposition that enactments creating summary offences do not extend to territorial waters is not likely to affect many people. Practically all forms of larceny and assault, however trivial, are indictable. So is malicious damage, however small in value, by leave of a judge, if the proceedings are brought under the Malicious Damage Act, 1861. Summary offences that can be committed on piers are, from their very nature, few in number and would comprise mostly those under the Food, Weights and Measures and Public Health laws. Indecent exposure, the use of foul language and insulting conduct are also summary offences which could be committed on piers or by persons in the waters of the sea; it would seem that unless operations were conducted on a sufficiently large scale (if one may use such a term in relation to indecent exposure) to justify proceedings on indictment for public nuisance, the police would have to fall back on the ancient common law right of the Sovereign to protect the nation's shores from insult—a very vague and unsatisfactory form of proceeding.

The above conclusions as to the non-application of enactments beyond low-water mark of the sea are not valid in respect of portions of the sea which by geographical configuration are deemed to be parts of English counties. Arms of the sea, such as Milford Haven (*R.* v. *Bruce* (1812) R. & R. 243), certain bays (cf. *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (1877) 2 App.Cas. 394) certain islands such as Lundy (*Harman* v. *Bolt*, 47 T.L.R. 219) and Steepholm (*Wright* v. *Harris*, 49 J.P. 628) in the Bristol Channel and parts of great estuaries and of the Bristol Channel itself (*R.* v. *Cunningham*, 23 J.P. 55) are deemed to be within the body of the adjacent county. Not all the Bristol Channel, however, is within the realm (*The Fagernes* [1927] P. 311, where the Court of Appeal accepted the Home Secretary's certificate as to parts of the channel being out of the realm).

A local Act may also incorporate land beyond low-water mark within an adjoining local government area or make special provision as to a particular pier (*Ryde on Rating*, 8th ed., at p. 522, gives some examples of the former type). The common law, statutes and bye-laws apply to all land between high-water and low-water marks (*Blackpool Local Board* v. *Kenyon*, 23 J. P. 198) and a magistrates' court may try offences there committed (*Embleton* v. *Brown*, 30 L. J. M. C. 1).

British ships are deemed to be a floating portion of English territory and the laws of England may be said, generally speaking, to apply to them, but whether every statute does so apply is doubtful. If a luxury liner has a shop on it, do the Shops Acts

apply to it while the liner is (a) in an English port, (b) in English territorial waters, and (c) in mid-Atlantic?

To sum-up the conclusions of this article:

(1) Parliament is undoubtedly competent to legislate for territorial waters and beyond;
(2) Enactments creating indictable offences apply within territorial waters;
(3) Enactments may also contain an express provision or a necessary implication that they apply within territorial waters;
(4) Enactments not in classes (2) and (3) probably do not apply within territorial waters beyond low-water mark of the open sea (the position as to ships and aircraft has not been considered);
(5) Certain parts of the sea by virtue of geographical configuration or local Acts are deemed part of adjacent counties;
(6) Land between high-water and low-water marks is part of the realm;
(7) A magistrates' court probably has no jurisdiction to deal with a person who has committed a summary offence beyond low-water mark, in the absence of an express statutory provision.

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REFLECTIONS ON SOME ASPECTS OF OPERATIVE MISTAKE IN CONTRACT

It is a matter of general agreement that the law of Mistake in Contract is a difficult branch of English substantive law. But it is equally a matter of surprise that so few attempts have been made in the past to establish the cohesion and identity of principle underlying the various sections of the topic. The essay that follows is an attempt to show, by reference to the controversy-centres of contractual mistake, the two or three broad and simple concepts that have informed the mass of judicial decision over the past one hundred and fifty years.

The chief barriers to the integration of the rules relating to operative mistake have been :

(1) the interpretation of the case of *Smith* v. *Hughes* [1];
(2) the limited scope of the estoppel-rule;
(3) the doubt whether there might not be some distinction of legal substance between bilateral and unilateral mistake;
(4) the disagreement as to the definition of ' fundamental fact '.

Smith *v.* Hughes and Estoppel

Before deciding whether a fact is a ' fundamental ' one, there is posed in all mistake cases the initial problem of whether the court will give effect to the mistake in question at all. Theoretically,[2] the problem arises whether the mistake be unilateral or bilateral; and the answer that courts give derives, I submit, in all cases from the application of the same principle.

The cases to be considered divide into two categories : there are the cases in which the courts have not, and those in which the courts have given effect to the instant mistake. The latter will be examined at the same time as the relationship between unilateral and bilateral mistake. The former may now be analysed in two stages.

To begin with, in practically every reported mistake case, the courts have refused to give effect to the alleged mistake on the ground that the doctrine of estoppel intervened. In the context of contractual mistake, the estoppel rule is capable of restatement in the following terms : that where B enters into a contract with A under a mistake as to its terms, but so conducts himself that a reasonable man [3] would believe he was assenting to the terms proposed by A, and A, on that belief, enters into the contract with B,

[1] (1870) L.R. 6 Q.B. 597.
[2] In practice, as will be seen, the court invariably gives effect to bilateral mistake.
[3] *I.e.*, the reasonable man of commerce.

then B is equally bound as if he had in fact intended to agree to A's terms.[4] A representative case is that of *Tamplin* v. *James*,[5] in which the defendant purchased at an auction properties which he mistakenly supposed, by reason of his lack of diligence, to include areas which the sale plan, whereunder the auction was conducted, clearly showed they did not. It was held that, applying the estoppel-rule, no effect could be given to the unilateral mistake. Or, in the robust words of James L.J., ' If a man will not take reasonable care to ascertain what he is buying, he must take the consequences '.[6]

But, where A *knows* of B's mistake, it is evident that the estoppel-rule is excluded. This additional fact is found in ' the really critical case of *Smith* v. *Hughes* ', as Prof. F. H. Lawson has aptly described it.[7] The crucial difficulty in *Smith* v. *Hughes* is that the court refused to give effect to the mistake in that case, even though the conditions for an estoppel did not exist, and even though no nominate rule of law was available. So far as the learned and leading textbooks on estoppel are concerned, the absence of any well-worn rule on which to base the decision in *Smith* v. *Hughes* has led to no mention at all of the case in Spencer Bower's *Estoppel by Representation* and Everest and Strode's *Law of Estoppel*, whilst, in Ewart's *Estoppel*, *Smith* v. *Hughes* is set aside under the despairing rubric of ' Miscellaneous Cases in which No Estoppel '.[8] However, the interpretative perplexity involved in the case is not confined to the specialised textbooks. Judicial dicta and the more general writings of learned and eminent jurists display their differences and offer six quite disparate interpretations which now fall to be examined.

(1) It has been asserted that *Smith* v. *Hughes* is authority for the rule that mistake as to the subject-matter's quality will have no legal effect unless it is the mistake of *both* parties.[9] By way of refutation, first, *Smith* v. *Hughes* was never concerned at all with the nature of the quality of the oats, in the sense of whether it was ' vital ' or not : the case turned entirely on the initial problem of giving effect to the purchaser's mistake. The relation between unilateral mistake and the subject-matter's quality was never discussed.

[4] Cp. Blackburn J. in *Smith* v. *Hughes*, *ibid.*, at p. 607.
[5] (1880) 15 Ch.D. 215.
[6] *Ibid.*, at p. 221.
[7] ' Error in Substantia ', 52 L.Q.R. (1936) at p. 102. Prof. Goodhart has gone further and called it the case ' on which the whole English law concerning mistake in contract is based ' : ' Mistake as to Identity in Contract ', 57 L.Q.R. (1941) at p. 231. But this, in my respectful view, is an exaggerated estimation, having regard to cases like *Scriven* v. *Hindley* and those cases which have settled the categories of fundamental fact.
[8] At. p. 66.
[9] Anson, *Law of Contract* (19th ed.), at pp. 147–8; Halsbury (Hailsham), Vol. 23, at p. 136; Chitty, *Contracts*, 20th ed., at p. 240; *per* Lord Atkin, *Bell* v. *Lever Bros.* [1932] A.C. at pp. 218–22.

Secondly, the cases cited in *Halsbury*[10] are, with respect, quite beside the point. And thirdly, Lord Atkin, in *Bell* v. *Lever Bros.*, did, it is true, give *Kennedy's Case*[11] as well as *Smith* v. *Hughes*, in support of this interpretation. But the learned and noble Lord handled the former solely in order to bring out the point that the Objective Theory of Fundamental Fact represented the pertinent law, for which alone is *Kennedy's Case* an authority. As to *Smith* v. *Hughes*, Lord Atkin merely quoted the passages in the judgments of that case which grappled with the problem of giving effect to the purchaser's mistake, and concluded: 'In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the grounds of failure of consideration'.[12] Assuming that 'these cases' are confined to quality cases, then, (i) the statement begs the question whether the quality is of so fundamental a kind as to affect 'the very thing . . . the other party contracted to take'; and (ii) it fails to face up to the prior requirement that effect be given to the mistake. Moreover, what sort of contract is it that is unenforceable if executory and void if executed? It is submitted with respect that Lord Atkin's arguments lend no support to the interpretation advanced.

(2) 'The rule in *Smith* v. *Hughes* can only be exhibited in a system of cross-estoppels'.[13] But what precisely is meant by 'cross-estoppels'? Is it that the purchaser was estopped from asserting his mistake and the vendor was too? Apart from this criticism, as has already been indicated, the vendor's knowledge in fact excluded the estoppel-rule entirely. It is with no disrespect that I comment that the phrase, 'a system of cross-estoppels', though possessing an impressionistic plausibility, must be rejected as legally inaccurate.

(3) The decision illustrates the application of the *caveat emptor* 'rule'.[14] The purchaser, it is true, did have to suffer the consequences of his mistake, but the vital question is *why* did the situation in *Smith* v. *Hughes* fall within the ambit of the maxim? *Caveat emptor* gives no answer to this question; it offers no explanation of principle or policy for the judgments in the case. Indeed, speaking more generally,

[10] *Op. cit.*, at p. 136, n. (*b*).
[11] (1867) L.R. 2 Q.B. 580.
[12] *Ibid.*, at p. 222.
[13] Prof. J. D. I. Hughes, 'Consensus and Estoppel', 54 L.Q.R. (1938) at p. 372.
[14] Champness, *Mistake in the Law of Contract* (1933), at p. 41.

the Latin tag in no wise represents or defines with any exactitude the contemporary state of English law. Again and again this jural postulate of a social philosophy of ' rugged individualism ' has been modified, with the result that so far from the buyer having always to take care of himself we find the law, in very many circumstances today, taking tender care of the buyer. However, the respective circumstances in which the buyer is or is not protected are left obscure by the maxim. Its content is too narrow, too one-sided, too monolithic, so to speak, for any reliance to be placed upon it as a legal rule. It has rather the quality of a legal catchword only.[15] Consequently, I submit, to say that *Smith* v. *Hughes* illustrates the application of this maxim of nebulous legal meaning is to say little of any real assistance.

(4) The decision illustrates the ' rule ' that mistaken motive is immaterial.[16] But, as in the case of *caveat emptor*, the mere statement that mistaken motive is immaterial takes us nowhere. It is true, in *Smith* v. *Hughes*, the particular mistaken motive there did not lead to any positive legal consequence in the purchaser's favour. On the other hand, *all* mistake cases, whether the mistake be operative or inoperative, involve of necessity a mistaken motive; and, in all, it may truly be said that the mere motive is without legal effect. But the decisions in all such cases turn on special principles that operate independently of motive altogether.

(5) The decision is authority for the rule that : ' A party cannot validly accept an offer which he knows the offeror does not intend '.[17] Assuming that by ' knowing ', Mr. Tylor meant knowing from some source extraneous to the terms of the offer, then it seems plain that, if *Smith* v. *Hughes* be authority for a rule of this type, it must be authority for the *converse* rule; since the decision proceeded on the footing that the vendor *could* validly accept the offer he knew the purchaser did not intend. The judgments of Hannen and Blackburn JJ., which the learned author summoned in his favour, do not, I respectfully submit, support his contention; but the full discussion must be left till later when the meaning of the judgments of Hannen and Blackburn JJ. will be examined in detail. Finally, in *London Holeproof*

[15] Open to criticism of a similar kind is the congeneric statement that the law imputes to a man the meaning which his words and conduct reasonably suggest. For this statement does not, in itself, explain on what occasions the law imputes such a meaning and on what occasions it does not.

[16] Kerr, *Fraud and Mistake* (5th ed.), at pp. 513–4, 550; Salmond and Williams, *Contracts*, at p. 217; Cheshire and Fifoot, *Law of Contract*, at p. 148; C. J. Hamson, ' Effect of Secret Fraudulent Intent ', 51 L.Q.R. (1935) at pp. 663–4; and to similar effect, Leake, *Contracts* (8th ed.), at p. 232.

[17] T. H. Tylor, ' General Theory of Mistake in the Law of Contract ', 11 M.L.R. (1948), at p. 258.

Hosiery Co. v. *Padmore*,[18] effect was given to the instant mistake not by reason of Mr. Tylor's rule, as he suggests, but by the application of those considerations which I shall subsequently describe, particularly in relation to the case of *Scriven* v. *Hindley*.[19]

(6) *Smith* v. *Hughes* is authority for the rule that: 'A mistake, even though known to the other party, is of no effect unless the mistake is one concerning the *terms* of the contract'.[20] By way of elaboration, Professor Goodhart continues: 'the test is . . . what did the purchaser reasonably, or to the knowledge of the seller, believe that the seller was promising to sell him? It is the interpretation of the *promise* which is the essential thing. This is based on the interpretation which a reasonable man in the promisee's position, would place on it'.[21] And such, concluded Professor Goodhart, was the meaning of Hannen J.'s direction to the jury. The heart of the learned and eminent writer's statement amounts, then, to this: that, unless the mistake was reasonably induced by the nature and mode of the promisor's promise, no effect will be given to it. As a description of the narrow rule in *Smith* v. *Hughes*, this statement is irreproachable. But it fails to see the significance of this rule as the product of a larger principle, and, consequently, fails to discover the link between *Smith* v. *Hughes* and those categories of cases where effect was given to the mistake by application of the principle to be presently discussed.

If the above criticisms be valid, the problem remains of what is the true interpretation of the case. I suggest that a clue to the understanding of *Smith* v. *Hughes* is to be found in a shrewd dictum of Lord Macnaghten in *George Whitchurch, Ltd.* v. *Cavanagh*[22]: 'The doctrine of estoppel by representation is a very old head of equity. . . . It is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules. . . . Perhaps some of the difficulties which have gathered round the present case have come from clinging to rules rather than attending to principles'. It is to the elucidation of the 'broad principle' mentioned that the next ensuing discussion is devoted. And, at the outset, it would be as well to give the principle sought for a name, which I suggest should be:

The Principle of Objective Appearances

The ideal contract is one that enshrines a perfect *consensus ad idem*.

[18] (1928) 44 T.L.R. 499.
[19] [1913] 3 K.B. 564.
[20] Prof. Goodhart, *op. cit.*, at p. 231.
[21] *Ibid.*
[22] [1902] A.C. at p. 130.

Ideally, too, from the point of view of the purely logical working of basic legal rules, a third party who takes a voidable title should continue, despite his bona fides, to remain assailable by the originally wronged party. But the law, it must be said, trite though the statement be, does not receive its shape through reflecting ideal conceptions but is moulded in the image of the social purposes it is required to subserve. This fact possesses an especial force in the law relating to commerce.[23]

It is a paramount requisite of commerce that its concluded bargains be, so far as is possible, stable and definite. The attainment of this end is rendered difficult, however, by the concomitant need for fluency and rapidity of transaction : wherefore the business man has to rely to a large extent upon mere commercial appearances and upon the good faith of the other negotiating party. To reconcile these conflicting elements in commercial dealings and to facilitate business transactions within the overriding framework of public policy the law has laid exceptional stress upon the binding force of appearances. Accordingly, contracts are upheld though *consensus ad idem* is absent. Accordingly, too, the bona fide third party obtains an absolute title in place of his transferor's voidable one. The needs of commerce necessitate this result. These and the other similar rules to be considered below form the translation into legal terms of the dictates of commercial convenience.

But commercial convenience is not the entire story. Success in business and in separate business transactions must necessarily depend upon a variety of 'operatives', important among which may be mentioned insight into values, full information and wide-ranging contacts. But our merchant's success will depend not merely on the strength of his own hand; it will not seldom be considerably influenced by the weakness of the other party's. The achievement of an advantageous bargain through the inferior judgment of the other party, of which our merchant knows but about which he remains discreetly silent, is a practice of which the business community does not disapprove : there cannot be a shadow of doubt that under the existing dispensation it is good business practice and good business morality.

The principle under discussion is compounded of the requirements of these twin factors of commercial morality and commercial convenience.

It is submitted, then, that the fundamental and substantive [24]

[23] The law of mistake extends, of course, beyond purely commercial cases. It is here examined only with reference to commerce because this is its major sphere of application, with the result that its major rules have in fact been shaped by commercial needs.

[24] A substantive principle, that is to say, as opposed to a principle or rule of evidence or procedure. It may be objected formally that, as my thesis consists partly in the proposition that estoppel is but a special projection of the principle of objective appearances, the principle cannot be said to be substantive in

Principle of Objective Appearances underlies the doctrine of estoppel and it is from this principle that that doctrine springs, together with those individual rules of law which are generally grouped under the heading of Estoppel, like the rule that, prima facie, one is bound by terms contained in a document to which one has appended one's signature, or the reputed ownership rules in bankruptcy, or the rule of ostensible authority in agency and partnership law, or the relevant rules relating to bills of exchange and the central conception of negotiability, which exhibits in translucent fashion the commercial imperative that appearances be given a special legal weight to the end of fostering the all-important fluency and reliability of dealings with negotiable instruments.

But the working of the principle goes beyond the limited scope of the estoppel doctrine. In my submission, it has, further, given rise to and underlies,

(1) the rule that an acceptance of an offer must, if it is to be effective, be overt;
(2) the rule that provided reasonable and necessary steps simply are taken to bring 'ticket' terms to the notice of the acceptor, the latter is bound by them, because deemed to know them [25];
(3) the rule of the exclusiveness of the contents of a contract wholly reduced to writing;
(4) the no-duty-of-disclosure rule;
(5) the following provisions of the Sale of Goods Act, 1893: s. 22 (market overt), s. 23 (bona fide purchaser from vendor with voidable title) and s. 25 (sale to bona fide purchaser by previous vendor who continues in possession of goods or their documents of title after right to sell has already been passed from him, or by previous purchaser who obtains possession of goods or their documents of title before a full right of disposal has accrued to him);
(6) the 'apparent possession' rule in the Bills of Sale Act, 1875, ss. 4 and 8;

and finally, the principle, I submit, lies back of the judgments and decision in *Smith* v. *Hughes*.

Before beginning with the facts of the case, it is convenient, by way of establishing a reference point, to specify a definition of

nature because estoppel forms part of evidentiary law. It must here be submitted that estoppel is a rule not of evidence but of substantive law. In form it is distinguishable from evidentiary rules in that it must be pleaded and may be waived without leave. In essence it is distinguishable in that it does not in any way define and control the manner of presentation of a case, as do the rules of evidence and procedure. It is only after all the facts composing the alleged estoppel have been evidenced that the court judges, or can judge, on the estoppel's existence. See also Phipson, *Law of Evidence* (7th ed.), at pp. 655–6; Ewart, *Estoppel*, at pp. 187–90; Williston, *Contracts*, Vol. 5, § 1508.

[25] Cp. also the irrebuttable presumption in favour of a company that members of the company and persons dealing with it are correctly cognisant of the contents of its memorandum and articles of association.

the principle in its contractual application alone, which will run as follows: that, when parties enter into an apparent contract with each other, where it is important in the interests of commercial morality and convenience that a binding force be accorded to appearances the contract will be upheld in spite of the taint of dubious conduct or the presence of a theoretical legal defect. Conversely, from the standpoint of the negative aspect of the principle, effect will be given to an evidenced mistake [26] where commercial considerations render this a fair and expedient result.

In *Smith* v. *Hughes* then, the facts were that vendor offered to sell certain new oats at 35s. a qtr., showing purchaser a sample. Purchaser counter-offered 34s. a qtr. and vendor accepted, knowing from a source extrinsic to the contractual transaction of purchaser's unilateral mistake in thinking vendor was selling old oats. Held: the contract was not void; no effect at all could be given to purchaser's mistake.[27] As Cockburn C.J. put it: 'The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not'.[28] And later: '. . . where . . . the buyer has full opportunity of inspecting and forming his own judgment, the rule *caveat emptor* applies. . . . The question is not what a man of scrupulous morality or nice honour would do under such circumstances'.[29] Blackburn J. said: 'I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound . . .; for, whatever may be the case in a court of morals,[30] there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the action of the vendor'.[31] Finally, Hannen J.: 'If . . ., in the present case, the [vendor] knew that the [purchaser], in dealing with him for oats, did so on the assumption that the [vendor] was contracting to sell him old oats, he was aware that the [purchaser] apprehended the contract in a different sense to that in

[26] In the sense that the mistake is proved by evidence of it. It is only when such evidence has been laid before the court that it can judge whether effect should be given to the mistake or not according to the substantive rules arising out of the principle.

[27] The court's judgment took the form of an order for a new trial on the ground that the jury had been misdirected by the judge below. The direction in question was that, provided the word 'old' had not been used between vendor and purchaser they should find for the purchaser if they decided that the vendor believed the purchaser to believe, or to be under the impression, that he was contracting for the purchase of old oats; that is, if they thought the vendor knew of the purchaser's mistake in thinking he was buying old oats. This direction the court rejected for the reasons given in the text; the vendor's knowledge without more did not affect the contract.

[28] *Ibid.*, at p. 603.

[29] *Ibid.*

[30] But Blackburn J. was, as I suggest, sitting in a court of *commercial* morals.

[31] *Ibid.*, at p. 607.

which he meant it, and he is thereby deprived of the right to insist that the [purchaser] shall be bound by that which was only the apparent and not the real bargain'.[32] And again: 'In order to relieve the [purchaser] it was necessary that the jury should find . . . that the [vendor] believed the [purchaser] to believe that he, the [vendor], was contracting to sell old oats'.[33] And Mr. Justice Hannen concluded that the purchaser could not be released from his contract.[34] Now, it becomes clear that Hannen J. was stating the same rule of law as his brother judges,[35] though in language with a subjective slant, if we pursue this line of dialectical reasoning: Under what circumstances could a court consider the vendor to have the belief in question? Only if he knew of facts to give him such belief. What kind of facts? Would a casual communication from a stranger be sufficient? No. How then must the operative class of facts be limited? Clearly, they must be facts connected with the contractual transaction. And within this category . . . ? Connected facts of the kind that would reasonably give rise to the mistaken belief in the purchaser's mind; as, for example, a misrepresentation on the part of the vendor or his agent or an agreement between vendor and purchaser to make the oldness of the oats a condition of the contract,[36] or any other connected fact of the kind to be discussed when the negative aspect of the principle is considered.

So then, the decision in *Smith* v. *Hughes* may be summarised by saying that, as no facts connected with the contractual transaction existed either to induce the mistaken belief in the purchaser or to induce in the vendor the belief that the purchaser thought the vendor was contracting to sell old oats, the purchaser's mistake was refused any effect and the apparent contract[37] held to be binding. But, it was not on grounds of estoppel that the simulacrum of a contract was given a binding force; nor is the decision explicable by the bare mention of the indefinite and inconclusive *caveat emptor* maxim. *Smith* v.

[32] *Ibid.*, at p. 610.

[33] *Ibid.*, at p. 611; similarly, Blackburn J. at p. 608.

[34] These rules laid down by Hannen J. were described by the learned judge as 'a corollary from the rule of morality which Mr. Pollock cited from Paley that . . . the promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it'. The corollary-connection between Hannen J.'s judgment and Pollock's rule is not really clear. What is plain, however, is that Hannen J. did not mean that the rules of law and morality were at this juncture identical. The law in *Smith* v. *Hughes* is condoned by commercial morality, however much philosophy's morality may boggle at it.

[35] *Supra.*

[36] Cp. Cockburn C.J. at pp. 603, 604, and Blackburn J. at p. 607.

[37] Cockburn C.J. added (at p. 606) that though 'the two minds were not *ad idem* as to the age of the oats, they certainly were *ad idem* as to the sale and purchase of them'. But this artificial distinction merely begs the question whether effect is to be given to the purchaser's mistake. I respectfully suggest that the learned judge's statement may be taken as exemplifying a transitional compromise between the objective and subjective views of contractual transactions.

Hughes, as I submit, was a decision squarely founded on the Principle of Objective Appearances, in that mere appearances were accorded legal sanction despite the taint of dubious conduct on the vendor's part because this was the result required by commercial morality [38]; the case represents no less and no more than the legal affirmation of the contemporary and yet-existing commercial ethic. In consequence, the case of *Smith* v. *Hughes* must be regarded as organically connected with the other decisions in which the operation of the mistake involved was denied, since the rule of commercial morality in *Smith* v. *Hughes* and the doctrine of estoppel both emerged from and are projections of the same parent-principle.

Unilateral and Bilateral Mistake [39]

Just as the doctrine of estoppel is too restricted in scope to explain all the cases in which effect is denied to the evidenced mistake, so too is the doctrine inadequate to contain all those cases in which effect is given to the mistake that is proved. Bilateral mistake cases and mistake cases of the *Webster* v. *Cecil* [40] brand are not to be comprehended in terms of estoppel or any other nominate and differentiated rule of law. As a result, the atomistic theory of the nature of the mistake rules has been pressed in the discussion of learned writers, who assert that different classes of mistake cases, of the kind now under consideration, are governed by different peculiar rules, there being no common principle. It is my contention, on the other hand, that if these cases be read in the light of the 'negative aspect' of the Principle of Objective Appearances, they will be found to fall into three categories, each of which is no more than a facet of the same pivotal idea, namely, that the court will give effect to the mistake when it feels impelled to do so by commercial convenience and morality; and, in accordance with this principle, the courts have given effect to the mistake in the following circumstances:

(1) Where the mistake is a bilateral one, unless the contract was agreed in absolute and unconditional terms. In point

[38] Anson's misgiving should be noted: *Law of Contract*, *ibid.*, at p. 148. For the different attitude of American law see Williston, *Contracts*, Vol. 5, §§ 1570A, 1573. See also Denning L.J. in *Solle* v. *Butcher* [1949] 2 All E.R. at 1120.

[39] Cheshire and Fifoot, *ibid.*, at pp. 137–8, adopt a threefold classification into common, mutual and unilateral mistake. The value of the category of mutual mistake is extremely doubtful. As defined, it is equivalent to bilateral mistake as to the other party's *intention*. Now, in none of the mistake cases cited by the learned and eminent authors is any special significance attached to a bilateral mistake of this type. Moreover, the classification affords so little assistance that the authors are driven in the end to inquire (at p. 145): 'Can it be said, then, that the doctrine of mutual mistake holds an important place in English law? . . . It can at least be answered that a mutual mistake is not sufficient *per se* to prevent the formation of a contract, and indeed that it is only one of the factors in the decisive issue—what is the sense of the promise?' It is suggested, with great respect, that the section on mutual mistake, as well as the phrase 'the sense of the promise', is in fact reaching out to some such principle of objective appearances as the one expounded above.

[40] (1861) 30 Beav. 62.

of fact, the present writer has been unable to find in the reports of the last 150 years the record of any case in which the courts have refused to give effect to a bilateral mistake on the grounds that the contractual terms were *impliedly* absolute and unconditional.[41] In *Raffles* v. *Wichelhaus*,[42] or again, *Cox* v. *Prentice*,[43] or *Falck* v. *Williams*,[44] the mistake was induced by the act of a third party or some other event connected with the contractual transaction. The court, therefore, was impelled to give effect to the bilateral mistake for similar reasons as are to be found in the second category. But, even where the bilateral mistake has not been so induced, the courts in this period have given effect to it. In the absence of *expressly* unconditional terms, the courts have reflected the commercial and indeed common sense of fairness in always giving effect to a mistake under which *both* parties laboured. But, plainly, this does not mean that unilateral and bilateral mistakes are somehow of legally different characters and to be treated differently at law. The determination whether effect is to be given to either proceeds upon the same considerations of commercial convenience and morality. It is simply in the nature of these considerations that in the case of a bilateral mistake without more, effect should in every case be granted to it.

(2) Where, in the case of unilateral mistake, the mistake has not been due to the misjudgment or fault of the mistaken party, but to some other circumstance by which it was reasonable in a commercial sense that he should have been induced to enter into the contract. Thus (i) the courts always give effect to a mistake induced by the misrepresentation, fraudulent or innocent, of the other party[45]; and

[41] In view of the meagre report of the case, *Scott* v. *Littledale* (1858) 8 E. & B. 815, is not a decision upon which reliance deserves to be placed in relation to fundamental bilateral mistake in contract. If it is to be given a place in a scheme of contractual mistake, I suggest that it would occur at this point most fittingly as a case in which the contractual terms were impliedly absolute and unconditional—a genuine ' cross-estoppel '.

[42] (1864) 2 H. & C. 906.

[43] (1815) 3 M. & S. 344. Short facts were that vendor purported to sell purchaser a bar of silver. Assay-marker, employed for the purpose by vendor, made the whole bar 4 oz., whereas it was 2 oz. 7 dwts. Vendor and purchaser contracted and purchaser paid as for a 4 oz. bar. Effect was given to the bilateral mistake induced by the third party's act, and the contract held to be void, the mistake referring to the subject-matter's identity: see n. 74, *infra*.

[44] [1900] A.C. 176; where a bilateral mistake was induced by a third party's act in sending a coded telegram couched in ambiguous terms. The mistake referred to the subject-matter's identity and the contract, consequently, was held to be void.

[45] *E.g.*, the identity cases and *Bell* v. *Lever Bros.* Where the misrepresentation is fraudulent the resultant mistake is unilateral; but where the mistake is innocently induced it is bilateral. Innocent misrepresentation is bracketed here with fraudulent as matter of usage; whether located here or under bilateral mistake, the legal effect is the same.

(ii) the court in like fashion gives effect to the unilateral mistake where the 'inducing circumstance' takes the form of a third party's act or some fact or occurrence apart from a person's conduct, as in *Scriven* v. *Hindley*[46] and *Thornton* v. *Kempster*.[47] In the former, Russian hemp and tow were put up for auction in two lots, namely, 63 to 67, 47 bales, being hemp and 68 to 79, 176 bales, being tow. Both lots had been landed from the same ship and both carried the same shipping mark, facts which, it was evidenced, ran counter to the universal experience of the trade. Moreover, the auctioneer's catalogue in no way differentiated between the respective natures of each lot. Before the auction, samples from each were laid out for inspection; but the buyer, reasonably—as it was held—relying on his experience, examined only the hemp bales, in the belief that he was thereby gaining an impression of the whole. At the auction, he duly bid for and purchased both lots, the second at a price extravagantly high for the tow in question. It was held that the contract for the sale of the tow was void, effect being given to the unilateral mistake. It had not been the result of the purchaser's fault or misjudgment, but was induced by the combination of extraneous circumstances implicated with the contractual transaction, *viz.*, the catalogue, the shipping mark, the unloading from the same ship, and the general knowledge of the trade. In the case itself, the auctioneer believed that the purchaser was mistaken as to value only. It is submitted that this particular fact was immaterial. The result would have been the same even if the auctioneer was fully aware of the nature of the mistake.

Thornton v. *Kempster* involved the negotiation of a sale of hemp by a broker acting for both vendor and purchaser. To vendor he handed a sale note stating purchaser to have bought from him 'St. Petersburgh clean hemp' (which the hemp in fact was). But purchaser's sale note mistakenly stated that vendor had contracted to sell him 'Riga Rhine hemp' (which was of a higher value). Held, that purchaser was not bound by the contract, effect being given to the unilateral mistake of identity of subject-matter, induced by the act of a third party, the broker.

(3) Where the mistake in the terms of an offer was not due to a misjudgment on the offeror's part nor in any real sense to the offeror's fault, but was a pure accident, and known to the offeree. By way of illustration of such unilateral mistake cases, in *Webster* v. *Cecil*, vendor had, in previous

[46] [1913] 3 K.B. 564.
[47] (1814) 5 Taunt. 786.

negotiations, refused to let purchaser have certain real estates for £2,000. Subsequently, vendor sent purchaser a written offer of the estates for £1,100 which purchaser snapped up. It was clearly evidenced that vendor meant £2,100, but miscalculated and wrote down the wrong sum in his hurry to catch the post. Specific performance was refused; but it seems evident that the contract to sell the property for £1,100 was void on the ground of fundamental mistake, effect being given to the mistake for the reason aforementioned and the mistake referring to a 'fundamental fact', namely, the agreed price of the apparent contract.

The case of *Hartog* v. *Colin & Shields* [48] is of like purport though stronger. There, an offer was made of Argentine hare skins at certain prices per pound instead of at those prices per piece, the value of a piece being much lower than that of a pound. In similar fashion to *Webster* v. *Cecil*, in the verbal and written negotiations which took place prior to the sale, reference had always been made to the price per piece and never to the price per pound, and expert evidence was adduced that Argentine hare skins were generally sold at prices per piece. From these facts Singleton J. deduced that the offer snapped up was the result of a purely accidental mistake and that, accordingly, no action for damages could be maintained because 'there really was no contract'.[49] The learned judge, in other words, gave effect to the mistake, and held that the contract was void because, as I shall submit, the mistake to which he gave effect referred to a fundamental fact, that is, to the price.

The Definition of 'Fundamental Fact'

Once the court has seen fit to give effect to the unilateral or bilateral mistake, the issue that next confronts it is to decide whether the fact to which the mistake refers is one which the general law [50] considers to be fundamental to the existence of the contract. The court's decision may vary according as it adopts as the basis for its finding the Objective or the Subjective Theory of Fundamental Fact.[51]

[48] [1939] 3 All E.R. 566.

[49] *Ibid.*, at p. 567.

[50] The *parties* may make any term, however trivial, vital to a contract's existence. But such an express condition has nothing to do with fundamental fact in mistake.

[51] The distinction between the Principle of Objective Appearances and the Objective Theory of Fundamental Fact is here taken for the first time. References in other writers to the 'Objective Theory' sometimes relate to fundamental facts and sometimes to the estoppel rule, or the *caveat emptor* maxim or the statement that the law imputes to a party the meaning that his words and conduct reasonably suggest. It is, however, essential to keep the principle and the theory apart because, although both embody the reigning tendency of the

The Objective Theory takes the form of two consecutive propositions : first, that the cases have now attained a degree of diversity which permits a fully comprehensive list of ' fundamental facts ' to be drawn up. Accordingly, the facts that go to the root of the contract are,

(1) identity of the other party,
(2) existence of the subject-matter,
(3) identity of the subject-matter,
(4) price, or consideration, and
(5) nature of the entire transaction.

And the second proposition is that, in considering whether the fact at issue falls within one of the above five categories, the comparison between the legal requirement and the situation under examination must be made in an objective way, without taking into account implied assumptions of the parties or the parties' respective motivations.[52]

On the other side, the Subjective Theory is entirely taken up with assumptions and motivations of the parties. In its view, a ' vital fact ' is one which, whether expressed or more generally implied, constitutes the underlying assumption without which the parties (or party) would not have made the contract they (or he) did.[53] That the ' underlying assumption test ' is something different from the objective test appears from those two classes of cases in which alone the Subjective Theory has at any time challenged the Objective : namely, where the case involved the question of a vital quality of the subject-matter, as in *Bell* v. *Lever Bros.*, and where the case involved the question of the identity of the other party, as in *Sowler* v. *Potter*.[54] It is only in the latter case that

courts to impersonalise legal standards, they each represent quite different answers to quite different questions of law.

[52] It has been suggested that the problem of fundamental fact should be dealt with as one of implied condition, *viz.*, was there an implied condition that the subject-matter should exist, that its identity should correspond with the parties' agreement: Salmond and Williams, *Law of Contracts*, at p. 219 ff., and Salmond and Winfield, *Law of Contracts*, at p. 191. In reply, the condition must clearly be a condition precedent so as to render the contract void *ab initio* on its non-fulfilment. Such condition precedent can only be implied if the parties might possibly have agreed to it; for terms are never implied which are inconsistent with the expressed will of the parties. Now, if the case is one of unilateral mistake, an implied agreement on the matter mistaken is clearly out of the question. Therefore, the implied condition theory can only and might indeed apply to bilateral mistake cases. With regard to the latter, the theory is not borne out by the decisions, which invariably speak in terms of mistake. The Legislature, too, in s. 6 of the Sale of Goods Act, 1893, speaks in terms of mistake. Consequently, though the implied condition theory might, in a restricted class of cases, yield the same legal result as the application of the Objective Theory of Fundamental Fact, its use is not supported by court or Legislature; it relies on a legal fiction, and it in no wise alters the legal result in the cases or illumines the decisions in matter of principle. See also, Prof. G. L. Williams' ' Language and the Law—IV ', 61 L.Q.R. (1945), at 404 and surrounding discussion. Cp. also Denning L.J. in *Solle* v. *Butcher* [1949] 2 All E.R. at 1119.

[53] Cp. Lord Warrington in *Bell* v. *Lever Bros*, *op. cit.*, at p. 208.

[54] [1940] 1 K.B. 271.

the supremacy of the Objective Theory remains temporarily in the balance. Mistake of identity cases, therefore, call for prior consideration.

Since the multiple facets of this topic have already received detailed treatment in past books and articles [55] and since my overall purpose is only to try to establish the hegemony of the Objective as opposed to the Subjective Theory over the field of fundamental fact, I shall, therefore, be so bold as to state in outline only the rules governing mistake of identity, laying my emphasis upon the weaknesses of the subjective test.

In determining objectively whether a fundamental mistake as to identity nullifies a contract, the central problem resolves itself into answering two questions :

(a) was the mistaken identity a material one? For instance, the identity of a person to whom one sells goods on credit is material, but not so the identity of the purchaser of a newspaper from a newsvendor. If the identity was not material, or, in other words, if the mistaken party was indifferent as to whom he was contracting with, the question of mistake of identity cannot and does not arise. If, however, the identity *was* a material one, then,

(b) did the mistake refer to the actual identity of the other party or merely to an attribute of his which does not, in a practical sense, amount to his identity? A perfect differentiation between identity and attribute is an impossible one to make in terms of logical analysis.[56] The perception of this real impossibility led the courts in the nineteenth century to lay down clear but quite arbitrary rules to govern cases of this kind. In the series of decisions, *Fletcher* v. *Krell*,[57] *Cundy* v. *Lindsay*,[58] *King's Norton Metal Co.* v. *Edridge*,[59] *Hardman* v. *Booth* [60] and *Baillie's Case*,[61] the courts established the objective test that a mistake as to identity arises, where A enters into a contract with B, thinking him to be C, an existing human or corporate entity. Where, however, 'C' was a fictitious entity that B had assumed, then no mistake of identity was considered to exist. The presence with or absence from each other of the parties was immaterial.

In *Sowler* v. *Potter*, however, Mr. Justice Tucker, following the secondary ground of decision of the Court of Appeal in *Gordon* v. *Street*,[62] held that there was a fundamental mistake of identity

[55] In particular, Prof. Goodhart's 'Mistake and Identity in Contract'; and Prof. G. L. Williams' 'Mistake as to Party in the Law of Contract', 23 Can.Bar Rev. (1943) 271, 380.

[56] Cp. Prof. Williams' article, *op. cit.*, at p. 271 ff., where a more elaborate and most valuable system of arbitrary rules is worked out.

[57] (1873) 42 L.J.Q.B. 55.

[58] (1878) 3 App.Cas. 459.

[59] (1897) 14 T.L.R. 98.

[60] (1863) 1 H. & C. 803.

[61] [1898] 1 Ch. 110.

[62] [1899] 2 Q.B. at pp. 647–8, where, in reading the court's judgment, A. L. Smith L.J. said that as 'the consideration of the person did enter into the

in his case because had the landlord known of the true *character* of his lessee, he would not have entered into the lease contract. This last statement represents the gist of the celebrated Pothier dictum which Tucker J. saw fit to invoke. Though the facts of *Sowler* v. *Potter* need not here be repeated, the reader will, I trust, excuse the full quotation of the Pothier test, since it is convenient to have it before us when subsequently analysing it : ' Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract '.

The dictum might be taken to embody innocuously only the question as to materiality of identity. And, indeed, it has been so taken by certain judges.[63] However, it has also been used as a specialised adaptation of the subjective test to identity cases. In this meaning, it is open, it must be respectfully submitted, to the adverse remarks which follow and which are also pertinent *mutatis mutandis* to the subjective test in its general form. Thus, if the Pothier test in this meaning were law,

(i) a mistake regarding *any* characteristic of the other party would nullify the contract, provided only it be relevant to the considerations that motivated the mistaken party in entering upon the contract. All misrepresentations, therefore, would involve *ipso facto* fundamental mistakes as to identity or other fact. In other words, admit the Subjective Theory to govern contractual cases and the commercially vital boundary line between the legal consequence of mistake and misrepresentation is forthwith washed away;

(ii) erroneous motives, even though not induced by a misrepresentation, become logically valid grounds for the nullification of a contract[64];

(iii) in at least one instance, the purpose of an enlightened social attitude would be gravely jeopardised, namely, that a man who has ' gone wrong ' should be allowed to have another chance.[65] For, supposing an ex-convict entered upon a contract of employment subject to three months' notice on either side. Then, his employer discovers his past record. If the Subjective Theory contained the law, the employer might dismiss the man without any notice, rightly declaring that the contract was void *ab initio* for mistaken identity since he would not have contracted with the man had he known his true character; and

(iv) apart from its vulnerability on grounds of general principle, *Sowler* v. *Potter* is diametrically opposed to the authority of

contract . . . the contract ought not to stand '. No further attention was paid to fundamental mistake of identity.

63 Fry J. in *Smith* v. *Wheatcroft* (1878) 9 Ch.D. at p. 230; Tucker J. in *Sowler* v. *Potter* [1940] 1 K.B. at pp. 274–5.

64 Provided effect be given to the mistake under the Principle of Objective Appearances.

65 The no-duty-of-disclosure rule helps to fulfil this purpose.

Fletcher v. *Krell* and *King's Norton Metal Co.* v. *Edridge*, and to the whole purport of the rules laid down in these and the other nineteenth century decisions aforementioned.

In the light of these comments, it must be respectfully submitted that the rule in *Sowler* v. *Potter* is an anomalous one which should not be followed by the High Court and is most suitable for overruling by a superior court.[66]

I noted that in the nineteenth century a mistake of identity *inter praesentes* was held to be both possible and operative. The more recent case of *Phillips* v. *Brooks*[67] may have been taken as authority to the contrary. Now, however, in the wake of *Dennant* v. *Skinner*,[68] we may look upon *Phillips* v. *Brooks* in the light of Viscount Haldane's chronological interpretation of that case[69] as a decision involving at most a misrepresentation only.[70] However artificial this reading may be thought, it has the merit of being legally impeccable and more than that of eliminating from the living stream of mistake cases a decision which, if it was authority for the proposition just mentioned as ascribed to it, ran clear counter to general principle,[71] and which, if it was not authority for that proposition, could not, analytically, be said to be authority for anything.[72]

With regard to the other facts that go to the root of the contract, the rules concerning existence of the subject-matter and nature of the entire transaction are in general agreement[73] and merit no

[66] Cp. Goodhart, *op. cit.*, at pp. 243–4.

[67] *Op. cit.*

[68] [1948] 2 All E.R. 29.

[69] *Lake* v. *Simmons* [1927] A.C. at p. 501.

[70] Assuming that if a man contracts to buy but does not intend to pay, his intention not to pay amounts to an implied misrepresentation in accordance with the dictum of Mellish L.J. in *Ex p. Whittaker* (1875) 10 Ch.App.Cas. 449–50.

[71] See Goodhart, *op. cit.*, at pp. 240–1.

[72] This statement results from my reading of what I consider to be the two passages of substance in Horridge J.'s judgment: (i) ' . . . though he believed the person to whom he was handing the ring was Sir George Bullough, he in fact contracted to sell and deliver it to the person who came into his shop, and who . . . was North, who obtained the sale and delivery by means of the false pretence that he was Sir George Bullough ' (at p. 246). This passage clearly belies the ' chronological interpretation ' and what is more, at its best, yields the ' *inter praesentes* interpretation ' which is justly decried. (ii) The Pothier test did not apply because ' the vendor intended to contract with the person present, and there was no error as to the person with whom he contracted, though the plaintiff would not have made the contract if there had not been a fraudulent misrepresentation ' (at pp. 248–9). Remembering the purport of the Pothier test these words of Horridge J. involve a hopeless contradiction.

[73] It should be noted that Mr. H. W. R. Wade proposed that the mistake cases relating to the existence or nature of the subject-matter should no longer be considered in terms of mistakes but in terms of impossibility: ' Consensus, Mistake and Impossibility in Contract ', 7 C.L.J. 361, 371. Of course, it is not the English doctrine of supervening impossibility that is in mind, but a notion of absolute impossibility like that in Roman law. Thus, the test would be: ' can the parties, having agreed, give effect to their agreement according to its terms?' (at p. 371). It is suggested, with respect, that the alteration is merely verbal and has no substantial value because it still leaves the problems of existence and identity and giving effect to the mistake where they were.

further comment. But something additional does remain to be said of identity [74] of the subject-matter and price, or consideration.

Mistake as to identity of subject-matter bifurcates into : (a) the cases of identity simply. Here, the objective approach has been the universal one [75]; and (b) the more difficult cases in which the problem posed is whether a *quality* of the subject-matter is of so vital a kind that the subject-matter without the quality is essentially different from the subject-matter as it was believed to be; or, put otherwise, whether the quality is of so vital a kind as to affect decisively the *identity* of the subject-matter. This statement of the objective test prevailed over the minority adherents to the Subjective Theory in the crucial case of *Bell* v. *Lever Bros.*, and formed the proposition on which was centred the key judgment of Lord Atkin. Further illustrations of this aspect of the Objective Theory are to be found in *Kennedy's Case*, and *Gurney* v. *Womersley*,[76] and, just recently, *Nicholson & Venn* v. *Smith Marriott*.[77]

It has been asserted, as mentioned already, that a *unilateral* mistake as to a vital quality would be inoperative.[78] This opinion I have already professed to refute, and I need here only reaffirm my previous position. Illustrative cases, however, are hard to find in the reports, but a clear example may readily be constructed by taking *Scriven* v. *Hindley* and imagining the inducing facts in that case to apply not to hemp and tow but to hemp of a superior kind, on the one hand, and hemp of so inferior a kind, on the other, as to be, in the market, a different commodity. Unilateral or bilateral mistake, however, the principles applicable are the same.

Turning finally to mistake as to price, or consideration, a distinction must first be taken. On the one hand, there may be a mistake as to the *value* of the subject-matter, leading to the ultimate

[74] The quantity or extent of the subject-matter is, in my submission, a fact that is relevant to either the subject-matter's existence or its identity. It does not form a category of fundamental fact in itself. As to existence, *Barrow, Lane & Ballard* v. *Phillip Phillips & Co.* [1929] 1 K.B. 574, may be cited : cf. Tylor, *op. cit.*, at p. 266. As to identity, *Tamplin* v. *James* and *Cox* v. *Prentice* are in point. In the latter, Le Blanc and Bayley JJ. referred to mistake as to quantity, whilst Dampier J. referred to mistake as to quality. This point was not fully taken and argued, however. But, in my submission, a 4oz. bar of silver is a different thing (as an object of sale) from a 2oz. 7dwts. bar, just as a large urn is a different thing from a small urn, though colour, pattern and design be the same. On this reasoning the mistake in *Cox* v. *Prentice* referred to the subject-matter's identity. Pollock and Halsbury are, it is true, to the contrary. But the cases cited in support by the former (*op. cit.*, at pp. 389–90) are *Thornton* v. *Kempster* and *Henkel* v. *Pape* (1870) L.R. 6 Ex. 7. *Thornton* has been explained previously above; *Henkel* involved the attempted acceptance of an offer that was never made actually, or even apparently, since Pape was not responsible for the telegraph clerk who was not his agent. The cases cited by Halsbury, *op. cit.*, at p. 137, n. (*f*) (cf. Champness, *op. cit.*, at pp. 31, 32) are all of the *Tamplin* v. *James* type and call for no further comment.

[75] See, *e.g.*, *Raffles* v. *Wichelhaus* (bilateral) and *Ionides* v. *Pacific Marine Insurance* (1872) 7 Q.B. 517 (bilateral), and *Tamplin* v. *James* (unilateral) and *Scriven* v. *Hindley* (unilateral).

[76] (1854) 4 E. & B. 133.

[77] (1947) 177 L.T. 189. Also, *Solle* v. *Butcher* [1949] 2 All E.R. 1107.

[78] See passages cited in n. 9, *supra*.

conclusion of a poor bargain. Here, the price agreed upon may be adverse to one party but no mistake exists in respect of it. The mistake of value goes to motive alone and is immaterial. On the other hand, there is the case of the true mistake as to the price apparently agreed upon. In this connection, some learned jurists have expressed the opinion that price can never be a fundamental fact.[79] But, unfortunately, no convincing authority is cited. Other learned jurists are to the contrary[80]; and in favour of the latter's opinion may be cited the cases already mentioned of *Webster* v. *Cecil* and *Hartog* v. *Colin & Shields*. In Halsbury,[81] indeed, we find the statement that mistake of price is 'available' in cases of the *Webster* v. *Cecil* type only, that is, only where an offer containing erroneous terms is made by accident to the knowledge of the offeree. But, in my respectful submission, mistake of price is, on principle, more widely available than Halsbury opines. Thus, suppose private parties enter into a contract for the purchase of shares, the price agreed upon to be the current quotation on the London Stock Exchange on the previous Thursday. On that day the shares stood at two quotations, a higher one in the morning than in the afternoon. It is evidenced that the seller intended the morning and the buyer the afternoon quotation. The resultant bilateral mistake as to price would, it is submitted, render the contract void *ab initio*.[82]

Conclusion

If the foregoing arguments be accepted, then, in my submission, a general theory of operative mistake in contract may be formulated in the following simple terms :—

Contractual mistake, in the sense of a state of mind,[83] may be unilateral or bilateral. Whether the mistake be unilateral or bilateral, it will render a contract void *ab initio* provided both of the two ensuing conditions are fulfilled :

First, the circumstances of the case must be such as to persuade the court to give effect to the mistake in accordance with the Principle of Objective Appearances as defined in its contractual application;

And Secondly, the mistake, to which effect has been so given, must refer to a fact that goes to the root of the contract. Whether a fact is of such a nature or not depends on the application of the Objective Theory of Fundamental Fact (subject only to what has been said about *Sowler* v. *Potter*).[84]

C. Grunfeld.*

[79] Halsbury, *op. cit.*, at p. 138; Tylor, *op. cit.*, at p. 265.
[80] Pollock, *op. cit.*, at pp. 400–1; Kerr, *op. cit.*, at pp. 549–50.
[81] *Ibid.*, at p. 138.
[82] By analogy to *Raffles* v. *Wichelhaus*.
[83] See Winfield, 'Mistake of Law', 59 L.Q.R. (1943), at p. 327; and Halsbury, *op. cit.*, at p. 129.
[84] A discussion of Denning L.J.'s original treatment of mistake cases in *Solle* v. *Butcher* must be deferred to the April number of this Review.

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EXTRA-TERRITORIAL EFFECTS OF CONFISCATIONS AND EXPROPRIATIONS

THE heavy inroads on private property during World War II have increased the interest in the question : ' What extra-territorial effect should be given to confiscations and expropriations ? ' I wish to outline the principles guiding our Austrian courts in solving this problem. I shall attempt to prove that these principles, embodied as they are in decisions of courts of many countries, may well be said to correspond to the prevailing doctrine of International Law.

Confiscatory and expropriatory measures have continued to be applied on an ever increasing scale since the end of the war. Some States have taken over large sectors of economic life on the strength of an extensive interpretation of the well-established rule that a State may expropriate private property where this is in the public interest. Similarly, the rule that a traitor forfeits his property to the State has been extended to deprive political, national, racial or religious minorities of all their belongings.

A State taking away property for either or both of these reasons now usually calls this process somewhat incorrectly ' nationalisation '. I shall refrain from using this term, which tends to confuse the issue of the payment of an indemnity. As this is the relevant fact for the treatment of this problem in International Law, I will use the term ' confiscation ' for the taking of property without indemnity and the term ' expropriation ' for such taking of property where an indemnity was paid.

What attitude shall a State adopt toward another State claiming extra-territorial effects for its confiscatory or expropriatory decrees ? Many solutions have been suggested. The most logical one and the one best suited to all circumstances lies in the acceptance of the maxim, that every State has a sovereign right to determine the fate of all property situated within its boundaries. Hence, a State issuing a confiscatory or expropriatory decree thereby acquires a full right to title to property situated at the time of the decree within its boundaries. If the confiscating State later tries to sell the confiscated goods abroad, its title must be recognised. The former owners cannot recover such property, even if they are nationals of the country into which the confiscated goods are eventually brought.[1] A slight modification may be introduced into this strict rule, to the effect that the confiscating State does not acquire

[1] *Ricaud* v. *American Metal Co.* (1917) 246 U.S. 304. This does of course not prejudice their claim for compensation. It is one of the best established rules of International Law, that a State may take property belonging to foreigners only against indemnity. This claim can, however, only be pursued through diplomatic channels and not through attachment of the originally confiscated goods.

the confiscated property by issuing the decree, but only by actually taking possession of the confiscated goods. There is a very old precedent for this. Philip II of Spain had issued a decree, whereby a certain Corneros was declared a traitor and all his property forfeited. Corneros was loading his property on his ship in a Spanish port at the moment the decree was issued. He succeeded in escaping to England with his ship, before Philip could lay hands on him or his property. Although this property was situated in Spain at the moment the decree was issued, the English court refused to hand it over to Spain, as Spain had never acquired actual possession.[2] This seems a just decision, as important as ever in times like ours. It shows that the application of the general rule, that no State shall sit in judgment upon the acts of another State made within its own boundaries, should be confined to the smallest number of cases. There are none the less good reasons for applying the general rule. An English judge has pointed out the dangers arising from the opposite attitude. Even if no diplomatic conflict would result from the disrespect shown to the sovereign rights of another State,[3] all trade with the confiscating State would come to a standstill, as former owners would reclaim all its export goods as their own or as compensation for their own.[4] In the case of the '*Austro-Hungarian Bank*', the Austrian Supreme Court refused to grant this bank an injunction in respect of banknotes, which the Hungarian Soviet Government had confiscated in their Budapest main office and which it had later sent to Vienna. The court declared that this confiscation was a sovereign act of the Hungarian Government within its own territory and therefore could not be judged by the court.[5] The view of the Austrian Supreme Court is shared by most courts in other countries.[6]

Our courts respect the sovereign rights of another State, to determine the fate of all property situated within its boundaries, because this right is also the basis for Austria's claim to her sovereign right to determine for herself the fate of all property situated within Austria, that is, to determine for herself, whether or not she shall give effect to foreign confiscatory or expropriatory decrees with regard to property inside her own territory.

Let us first consider the question of competence. The problem whether property has actually been transferred by virtue of a foreign confiscatory or expropriatory decree is strictly a legal one, to be solved by the courts. In 1946, the Minister of a foreign State

[2] *Don Alonso de Velasco* v. *Corneros* (1612) *sub. nom. Sir John Watts*, quoted by A. N. Sack, 'Conflicts of Law in the History of English Law' in *Law, a Century of Progress*, Vol. 3, pp. 363–364.
[3] *A. M. Luther* v. *Sagor & Co.* [1921] 3 K.B. 532, 558–559, quoted by Wolff *Private International Law* (1945) para. 169.
[4] *Paley Olga* v. *Weisz* [1929] 1 K.B. 718, reported in *Zeitschrift f. Ostrecht*, 1929 p. 1216 ff.
[5] Decision of August 27, 1919, *Gerichtszeitung*, 1919, p. 380.
[6] Cf. notes 1, 3, 4.

requested the Austrian Department of Foreign Affairs to enforce certain claims of his State to property situated in Austria. He suggested that the Austrian authorities should seize the property concerned and hand it over to his State. Our Department of Foreign Affairs, following the example of the U.S. Department of State in the '*Navemar*' *Case*,[7] refused to grant his request and advised him to bring his claim before the competent Austrian courts.

Since our constitution provides that the universally recognised rules of International Law are valid as integral parts of the Austrian law,[8] our courts have to apply these rules to all claims to enforce foreign confiscatory or expropriatory decrees. The rules concerning confiscation are very clear. From the times of the American Revolution [9] right down to Hitler's anti-Jewish laws [10] it has always been held that a confiscation cannot operate on property situated outside the confiscating country at the time of the confiscation.[11] The enforcement of foreign confiscations would furthermore be repugnant to our public policy. This does not imply any moral judgment on the policy of the confiscating State. If Austrian citizens are concerned, we simply see no reason why we should despoil our fellow citizens for the benefit of a foreign State. If foreigners are concerned, they are usually living in Austria as refugees. The enforcement of the foreign confiscatory decree would deprive them of their last means of subsistence, and make them a burden upon Austrian public assistance. The general rule is as clear as these reasons are convincing. Yet its application is far from simple in all cases, as, for example, where the confiscated property does not belong to a natural person, but to companies, corporations, etc.

It is a rule of International Law, that companies, etc., are governed by the law of the country of their domicile. They owe their very existence to this law. What is the result, when this same law declares them dissolved and all their assets transferred to the State? The most satisfactory way to reconcile this rule with the rule of non-enforcement of foreign confiscatory decrees was found

[7] Hackworth, *A Digest of International Law* (1942) 2, 449–450.
[8] Article 9 of the Federal Constitution of 1929.
[9] *Folliott* v. *Ogden* (1789) 1 Blackstone, 123–135, quoted by Wolff, *Private International Law* (1945), para. 500.
[10] *Frankfurter* v. *Exner, Ltd.* [1947] Ch. 629, *Law Times Journal*, Vol. 204, p. 25.
[11] This was recognised by the Austrian Supreme Court when it ruled on March 10, 1948, that the dissolution of the National Socialist Teachers' League and the confiscation of its assets in Bavaria, *i.e.*, in the country where this League had its headquarters, could not affect property of this League situated in Austria. On the other hand, the Austrian legislation, which had also dissolved the National Socialist Teachers' League and confiscated its assets, could not, in the opinion of the Austrian Supreme Court, affect property of this League situated in Czechoslovakia (Case reported in *Juristische Blätter*, 1949, pp. 70–72).

in certain French decisions [12] recently followed by the Austrian courts. They recognise the dissolution of the companies but not the transfer of their property to the foreign State. With their dissolution in the country of domicile the companies are also dead under Austrian law. However, if a dead person leaves property in Austria, a curator may be appointed by the courts to administer his affairs until the heirs claim the inheritance.[13] Austrian legal doctrine [14] has always accepted this as applying by analogy to dissolved companies, corporations, etc.[15] Under this rule, the Vienna Appellate Court,[16] upon request of an Austrian creditor, appointed a curator for a firm dissolved abroad but having a bank account in an Austrian bank. The curator had to settle the debt out of this account. A dissolved company may not only be sued in this way, but may also bring suit. Prior to its dissolution abroad another company had ordered a Vienna lawyer to collect a debt. Under Austrian law, the power of attorney of a lawyer survives the death, in this case, the dissolution, of the person represented by him,[17] until it is revoked by his heirs. The lawyer had continued the suit after the dissolution of the company abroad. Subsequently, the foreign nationalised company, which had succeeded to all the assets of the dissolved company in the country of its domicile, attempted to oust this lawyer from the suit and to collect the debt. In this case the Austrian Supreme Court [18] found for the lawyer representing the dissolved company, provided that he could prove that the dissolution was truly a confiscation without payment of adequate compensation.

After the curator has settled and collected all the outstanding debts, what shall become of the residue? To hand it over to the confiscating State would not only be contrary to the rule of non-enforcement of confiscations, but would also be contrary to the principle of equal treatment of juridical and natural persons. To

[12] *Cockerill* v. *Compagnie Union et Phénix Espagnol*, Cour de Cassation (Req.) of July 4, 1933, Clunet, 1934, p. 662; *Compagnie d'Assurance Nord de Moscou* v. *Compagnie Union et Phénix Espagnol*, Paris (3e ch.), June 13, 1928, Clunet, 1929, p. 119.

[13] Österr. Zivilprozessordnung of 1895, para. 155, ABGB, para. 811.

[14] Ehrenzweig, *Kommentar zum ABGB*, Allg. Teil par. 84.

[15] This fiction of the prolonged existence of a dissolved corporation for the purpose of its liquidation has also been accepted by the French decisions quoted above, note 12. Under English law (s. 400, Companies Act, 1948), a winding-up order is necessary for this purpose. The English courts, however, may give this order only if the dissolved company did at any time 'carry on business' in Great Britain. This notion has lately, however, been so liberally interpreted, that it seems that a winding-up order could now be granted in almost all cases. (Cf. in *Re Tovarishestvo Manufactur Liudvig Rabenek* [1944] 1 Ch. 404.)

[16] Decision of March 3, 1948; Case No. 307 in reports of Österr. Juristenzeitung, 1948, p. 179.

[17] Österr. Zivilprozessordnung, para. 155.

[18] Decision of July 9, 1948; Case No. 773 in reports of Österr. Juristenzeitung, 1948, p. 471.

leave the assets for an indefinite period in the hands of the Austrian debtors would in fact amount to making an entirely unjustified present to them. To claim them as *res nullius* for the Austrian State would make Austria profit by a foreign confiscation which she refused to enforce in her own courts for reasons of public policy Besides, the reasons of public policy set forth above, as well as fairness, demand that the assets be handed over to the persons having the only equitable claim to them : to the partners or shareholders of the dissolved company. As long as such persons can be found, the assets cannot honestly be considered as *res nullius*. The New York Civil Practice Act [19] orders them to be held by a trustee, until such time as such claimants may appear. The same sound principle has been followed by the Swiss Federal Court and by the Brussels Court of Appeal.[20, 21]

The above-mentioned decision of the Austrian Supreme Court concerned a case where the foreign company had been described as 'nationalised'. It therefore was not apparent whether it had been confiscated or whether it had been expropriated against adequate indemnity. The court, therefore, had also to consider this second alternative. The attitude of International Law to foreign expropriatory decrees has undergone a marked change since the days of the Spanish Civil War. Before that time, it had been considered incompatible with the sovereign rights of a State A, that State B should take over property situated in State A without the owner's consent, as B would thus exercise sovereign rights on the territory of A.[22] This attitude was adopted even in cases where B was willing to pay indemnity and where B intended the measure to apply only to property of her own subjects situated in A. However, when French courts began to admit that the Spanish Republican Government could expropriate Spanish ships in French ports,[23] this argument was no longer good. A new doctrine of International Law thus developed and was confirmed during World War II, when English [24] and U.S.[25] courts did grant

[19] Para. 977 b, sub-div. 19; cf. note 9 in *U.S.* v. *Pink* (1942) 315 U.S. 203.

[20] Prochorows Erben gegen Obergericht Zürich (Sulzer S.A.), October 26, 1929, BGE 55, I. No. 47. Brussels Court of Appeal (1e ch.), June 25, 1947: Soc. an. Comp. Belgo-Lithuanienne d'Électricité, Journal des Tribunaux, 1947, p. 105.

[21] English courts hesitated to adopt this principle.' They seemed to admit the possibility that the rights of the shareholders had become extinct (*Russian & English Bank* v. *Baring Bros.* [1932] 1 Ch. 435, 445) and that the Crown could possibly claim these assets as bona vacantia, although such claims have never been made (*Russian & English Bank* v. *Baring Bros.* [1936] A.C. 405). In a more recent decision, however, the Privy Council held the former shareholders of a dissolved company entitled to the residue of its assets (*Dairen Kisen Kabushiki Kaisha* v. *Shiang Kee* [1941] A.C. 373).

[22] Wilson, *On International Law* (1927), p. 80. Schnitzer, *Handbuch des Internationalen Privatrechtes*, Zürich, 1937, p. 267, note 1.

[23] Cour de Poitiers, December 20, 1937; *Société Cementos Resola* v. *Larrasquita et Etat Espagnol*, Clunet, 1938, p. 287.

[24] *Lorentzen* v. *Lydden* [1942] 2 K.B. 202, quoted by Wolff, para. 501.

[25] *Anderson* v. *Transandine Handelsmaatschappij* (1942) 36 *American Journal of International Law* (1942), pp. 701–706.

extra-territorial effect to Norwegian and Dutch expropriations of ships situated in Great Britain and in U.S.A. This was not only a war measure, as the Supreme Court of neutral Sweden reached the same decision in the '*Rigmor*' *Case*.[26] Strictly speaking, these last cases were not proper expropriations, as the expropriating State did not want to acquire the property permanently. The Dutch decree said *expressis verbis*, that the expropriated goods should be handed back to the original owners at the end of the war and the same was to be implied from the Norwegian decrees. The fact remains, however, that States gave extra-territorial effect to decrees of foreign States affecting property. They were, however, only ready to do so if these decrees did not amount to confiscation. It was stated in the English case, that the comity of nations required the application of the new rule. As comity of nations generally implies reciprocity,[27] a foreign State can avail itself of this privilege only if it grants reciprocity by giving extra-territorial effect to the other State's expropriatory decrees.

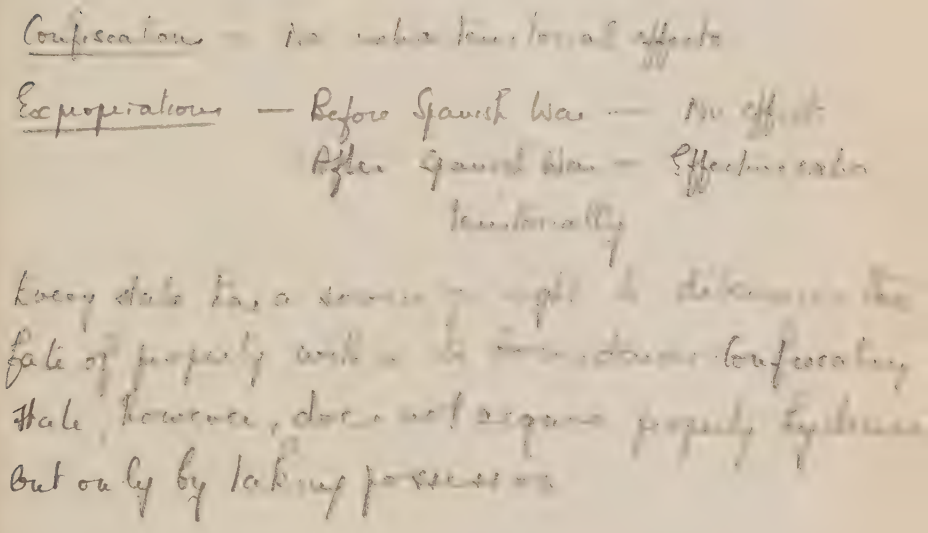
As the difference between an expropriation, which has extra-territorial effect, and a confiscation, which has not, lies in the payment of indemnity, it seems just that before granting extra-territorial effects to expropriations the courts of the granting State should examine whether such indemnity is adequate. This is the reasonable attitude of the British courts.[28] The French courts had developed the strange theory, that the promise of payment of some kind of indemnity was enough to change a forbidden confiscation into a permissible expropriation. All doubts as to whether the Spanish Government would be really willing and able to pay the promised indemnities were rejected, as it would be offensive to doubt the good faith of a foreign government.[29] Facts soon proved how right the sceptics had been. This theory misled a French lawyer [30] to maintain in 1939, that the Nazi measures against Jewish property should be recognised in France, as they contained promises of indemnity. The absurdity of this view is self-evident. The whole purpose of the non-enforcement of foreign confiscations could be stultified, if the confiscating State were to take the precaution of including some hypocritical assurances of an eventual payment of some nugatory indemnity in its confiscatory decrees. The Austrian Supreme Court [31] in accepting the new rule of International Law giving extra-territorial effect to expropriations did of

[26] Decision of March 17, 1942, 37 *American Journal of International Law* (1943), p. 141.
[27] *Hilton* v. *Guyot* (1895) 159 U.S. 113; *contra*: Schmitthoff, *A Textbook of the English Conflict of Laws* (1945), p. 410.
[28] *A/S Tallina Laevenhusis* v. *Tallina Shipping Co.* (1947) 80 Ll.L.R. 99, 111.
[29] Cour de Poitiers, December 20, 1937; see *supra*, note 23.
[30] Mettetal, 'Exercise en France par les réfugiés étrangèrs des droits, qu'ils détiennent de leur activité commerciale antérieure', Clunet, 1939, p. 257 ff.
[31] See *supra*, note 18.

course insist on examining itself, whether the indemnity was adequate.

I am fully aware that the problems involved would merit a more detailed study. I hope, however, to have given a comprehensible summary of the doctrine of the Austrian courts concerning foreign expropriations and confiscations and to have proved that their decisions follow well-established precedents of International Law.

IGNAZ SEIDL-HOHENVELDERN.*



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STATUTES

LANDLORD AND TENANT (RENT CONTROL) ACT, 1949

THIS Act is designed to stop a number of loopholes in the Rent Acts and the Furnished Houses Act, 1946. It will no doubt effectively eliminate some abuses but may possibly be responsible also for creating some fresh hardships. That it will add considerably to the sad welter of confusion in which this branch of the law is but too deeply immersed will be apparent from a very cursory perusal of its involved provisions. The Government has followed in the footsteps of its predecessors in declining to attempt the task of consolidation, notwithstanding the emphatic recommendations of the Ridley Committee in 1945, and, as it must seem to a mere lawyer, upon grounds which hardly carry conviction.

The main provisions of the Act may be summarised as follows:—

1. Under the Rent Acts the standard rent is fixed by reference to the letting on the relevant date [1] or the last letting before that date or the first letting thereafter. Thus, premises within the financial limits of the Acts but let for the first time during the war have their standard rents fixed by that letting. This has meant that in some cases a landlord who was able to exploit the war-time difficulty of finding accommodation by charging an unreasonably high rent on first letting his premises, thereby secured a legal right to continue to exact that excessive rent. The rather belated provisions of section 1 of the new Act enable cases where the rent is fixed on a letting after September 1, 1939, to be referred, by either landlord or tenant, to a Rent Tribunal for the purpose of fixing the reasonable rent.[2] The Tribunal thus has power under this provision to do what was beyond its jurisdiction under the 1946 Act,[3] *viz.*, reduce a rent below the standard rent. It still remains unable, however, to *increase* an existing rent,[4] so that a landlord who, owing to air-raids in the district or perhaps out of generosity to a friend, let the premises at a rent below the economic rent, is not entitled to increase it on a subsequent letting. No guidance is given in the Act as to how the Tribunal is to settle the standard of reasonableness. It must be admitted that some hardship may result if

[1] August 3, 1914 (1920 Act, s. 12 (1)); or September 1, 1939 (1939 Act, s. 3, and Schedule I).

[2] Special rules are provided in the case of an apportionment, where the standard rent of a dwelling-house within the Acts, or of a part of such a dwelling-house, has been determined under s. 1 (1949 Act, s. 4).

[3] *R.* v. *Paddington Rent Tribunal* [1948] 2 All E.R. 528.

[4] Under the 1946 Act, the Tribunals can only increase a rent where they are of opinion that there has been an increase in the cost of providing services since September 3, 1939 (s. 2 (4)).

Tribunals base their standard on that of controlled pre-war lettings in the vicinity, for whereas practically all other prices have risen considerably since the war, such rents have been artificially pegged at what in some cases is an uneconomic level. Thus a house converted into separate flats since the war and whose rent is determined by reference to controlled rents in the neighbourhood, rather than on the basis of the landlord's expenditure, might produce a very harsh decision for the landlord, and uncertainty on this matter may have a deterrent effect on conversions which are within the financial limits of the Rent Acts. At the same time it seems only right that the landlord should not be entitled to pass on to his tenant the equivalent in rent of extortionate sums disbursed by him in the hope of recouping himself by exploiting subsequent tenants. To hold the scales evenly will indeed be no simple feat.

2. The Act also amends the law relating to premiums paid for premises within the Rent Acts. Such premiums were already unlawful under those Acts,[5] except, firstly, in the case of a term of fourteen years or upwards,[6] or, secondly, on an assignment by a contractual tenant of his tenancy.[7] All premiums, including these two cases, are now unlawful,[8] except that on an assignment—

(a) the assignor may charge a sum to cover outgoings disbursed after the assignment, structural alterations effected by himself or a reasonable amount paid to his predecessor in respect of such alterations carried out by the latter, and a reasonable amount for any goodwill relating to the premises where the goodwill is transferred to the assignee[9];

(b) where a premium had prior to the Act been lawfully paid by the tenant on the grant, renewal, or continuance of a tenancy, a proportion of the premium can be passed on to an assignee, *viz.*, an amount representing the proportion between the period from the date of the assignment to the relevant date and the period from the grant, etc., of the tenancy to the relevant date.[10]

The Act is also retrospective inasmuch as a premium paid under any agreement made after March 25, 1949, can be recovered, though the Act did not come into force until June 2, 1949. But if the payment is made before the commencement of the Act and would have been lawful under the earlier Acts, the agreement is voidable at the instance of either party.[11] Moreover, there is provision for a tenant who has made an application to a Tribunal under section 1,

[5] 1920 Act, s. 8 (1).
[6] *Ibid.*, s. 8 (2).
[7] *Remmington* v. *Larchin* [1921] 3 K.B. 404.
[8] 1949 Act, s. 2 (1) and (2).
[9] 1949 Act, s. 2 (4).
[10] *Ibid.*, First Schedule, Part II, para. 5 (1) and (2). For the mode of ascertaining the relevant date, see First Schedule, Part III, para. 6. Only the original tenant or a person deriving title from him can obtain the benefit of this provision (First Schedule, Part II, para. 5 (1) (*b*)).
[11] Section 2 (5).

within twelve months of the commencement of the Act, to recoup himself in respect of a premium paid before the Act on the grant, renewal or continuance of the tenancy, whether such a premium was lawful at the time of payment or not. The procedure is that the Tribunal will certify that Part I of the First Schedule applies and will then determine the 'rental equivalent' of the premium.[12] This means the amount of the premium divided by the number of rent-periods between the commencement, renewal or continuance of the term and the relevant date.[13] The rent then payable by the tenant or by any subsequent tenant after the Tribunal's determination and before the relevant date, will be the reasonable rent (as fixed under section 1) less the rental equivalent.[14]

An excessive price for furniture, fittings or other articles required as a condition of the grant, renewal, continuance or assignment of a tenancy is to be treated as a premium so far as the excess is concerned.[15] On request the seller is bound to state the price in writing.[16]

Premiums are also prohibited in the case of furnished premises whose rents have been determined by a Tribunal.[17] These were already unlawful under the 1946 Act in the case of the grant, renewal or continuance of the contract,[18] but the 1949 Act extends the prohibition to premiums on assignment, while permitting payment of a sum to cover outgoings after the grant or assignment, or in respect of goodwill.[19]

The requiring of an illegal premium is made an offence punishable on summary conviction by a fine of £100. The court convicting the offender may order the sum unlawfully required to be repaid.[20]

Actions to recover payments prohibited by the Act may be brought in the county court, and if such claims are brought in the High Court they are subject to the usual rule [21] that the plaintiff will be deprived of all costs.[22]

3. A rather startling development occurred in 1945 when the Court of Appeal construed the words 'let as a separate dwelling' [23] in the Rent Acts, as excluding premises let on terms which included

[12] First Schedule, Part I. Where the tribunal issues a certificate the premium ceases to be recoverable by any other means (*ibid.*, para. 4 (1)).
[13] First Schedule, Part III, para. 8. For 'relevant date', see *ibid.*, para. 6.
[14] First Schedule, Part I, para. 2. For the position where before March 25, 1949, the landlord has assigned the reversion for value, see *ibid.*, paras. 1 (*b*) and 3.
[15] Section 3 (1). Section 9 (1) of the 1920 Act, which contained a corresponding provision, is repealed (1949 Act, s. 3 (3)).
[16] 1949 Act, s. 3 (2).
[17] 1949 Act, s. 12.
[18] 1946 Act, s. 4 (1) (*b*).
[19] 1949 Act, s. 12 (1) (*a*) and (*b*).
[20] Section 2 (6).
[21] 1920 Act, s. 17 (2).
[22] 1949 Act, s. 13.
[23] 1933 Act, s. 16 (1).

a sharing of 'essential living accommodation',[24] whether with another tenant or the landlord himself.[25] For this purpose a kitchen was held to be essential living accommodation,[26] but not a bathroom or w.c.[27] A large number of tenants who were thought to be protected found themselves liable to eviction on the determination of their contractual tenancy, a simple enough result to achieve at common law in the case of a periodic letting, such as a weekly or monthly tenancy. The Act has now created a curious distinction between cases where the sharing is with the landlord, or with a person or persons other than the landlord. In the former case the premises are still outside the Rent Acts, but the letting is treated as within the 1946 Act even though it is an unfurnished tenancy and no services are provided.[28] Consequently the tenant will be entitled to have the reasonable rent fixed by a Tribunal and can avail himself of the limited security of tenure afforded by that Act as amended by the 1949 Act (see below). In the latter case the letting will now be controlled so far as the portion of the premises is concerned which is in the exclusive occupation of the tenant.[29] As for the shared accommodation, this is placed in a sort of no-man's land between full control and freedom from control. No order for the ejectment of the tenant from the shared accommodation can be made unless a like order has been or is made in respect of the separate accommodation.[30] On the other hand the landlord may apply to the county court, notwithstanding this provision, for an order either *terminating* the right of the tenant to use that part of the shared accommodation which is not *living* accommodation, or *modifying* his right to use *any* of the shared accommodation, provided this is permitted under the terms of the letting.[31]

The principle of *Neale* v. *Del Soto* was even applied so as to deprive a tenant, who sublet the premises on the terms that he was to share essential living accommodation with his subtenant, of any protection as against the head landlord.[32] The basis of this decision was that the status of the premises depended on the conditions of actual user at the date of the proceedings. This point has now been reversed by the 1949 Act.[33] But, as between tenant and subtenant, sections 7 or 8 of that Act will apply according to the nature of the sharing arrangement. It may be added that a similar rule in regard to the effect of a furnished subletting has also been reversed as between the tenant or subtenant and the head landlord.[34]

[24] *Neale* v. *Del Soto* [1945] K.B. 144.
[25] *Llewellyn* v. *Hinson* [1948] 2 All E.R. 95.
[26] *Neale* v. *Del Soto*, *supra*.
[27] *Cole* v. *Harris* [1945] K.B. 474.
[28] 1949 Act, s. 7.
[29] *Ibid.*, s. 8.
[30] Section 8 (7).
[31] Section 8 (8). Cf. s. 8 (6).
[32] *Turner* v. *Baker* [1949] 1 All E.R. 560.
[33] Section 9.
[34] *Ibid.*, and see *Prout* v. *Hunter* [1924] 2 K.B. 736.

4. Much criticism was launched against the 1946 Act on the ground that it afforded insufficient security of tenure to tenants. Under that Act, where a tenant applies to a Tribunal and is then served with a notice to quit, the notice does not take effect until at least three months from the date of the determination of the Tribunal unless the Tribunal directs a shorter period to be substituted.[35] A tenant may now apply for successive three-monthly extensions of his security of tenure provided the applications are made before the notice to quit expires, whether in pursuance of the contractual terms or by virtue of the provisions of the 1946 or the 1949 Acts.[36] This is a very large extension of the Tribunals' powers and it is by no means clear on what basis it is to be exercised. If such extensions are granted practically automatically, merely on account of the absence of suitable accommodation, the dividing line between a furnished and an unfurnished letting may become very thin. It is indeed a question whether Tribunals founded merely as part of the mechanism of price-fixing are entirely suited to the judicial weighing of the conflict of interests and relative hardship of the parties which under the Rent Acts fall to be decided by the county courts.

Although there is much to praise in the Act it must be admitted that there are certain disquieting features. Firstly, there is the rather partisan view that seems to pay insufficient regard to the formerly accepted view that the Rent Acts exist for the protection of tenants and not the penalising of landlords. Secondly, there is the steadfast refusal even to set the machinery in motion for reducing this branch of the law into a more coherent shape. Thirdly, there are ominous signs of encroachment by the Rent Tribunals into the sphere which is properly that of the regular courts. Regarded as a mere instrument in the process of price-fixing the Rent Tribunals no doubt perform a useful and necessary function and one which might well have proved overwhelming to the machinery of the ordinary courts. The new Act, however, by conferring jurisdiction on those Tribunals to consider matters within the Rent Acts, and also to grant continuing security of tenure, might well become the thin end of the wedge in bestowing increasing competence upon the Tribunals to settle disputes of a judicial character, for which, the opinion may be respectfully ventured, they are not really suited either in their procedure or their personnel. It is to be hoped that if consolidation eventually comes—and it hardly seems likely that it can be avoided by the next Parliament—an attempt will be made to restrict the province of the Tribunals to cases where no more is involved than fixing a reasonable rent. Current statistics indicate that even when the time for revision

[35] 1946 Act, s. 5.
[36] 1949 Act, s. 11.

arrives, the volume of work before such Tribunals is not likely to be so reduced as to enable the whole of this branch of the law to be dealt with once again by the county courts.

DENNIS LLOYD.

LEGAL AID AND ADVICE ACT, 1949

SOME lawyers have seen in the new Legal Aid Scheme the first step down the slippery path to a National Legal Service; others have shared the view expounded by some laymen, that it is a cunning piece of window-dressing by the legal profession designed to distract public attention from the abuses in our present legal organisation and to stave off any suggestion of nationalisation. Those of the former school of thought shake their heads at the gullibility of the Law Society and Bar Council, while those of the latter applaud the Machiavellian cunning of those bodies, and contrast it with the less adroit behaviour of the B.M.A. In truth, as most lawyers realise, it is neither of these, but a new and more realistic approach to an old problem—that of making available legal aid and advice to those unable to afford it. This approach has been rendered urgent by the fall in the value of money, which has made the present financial limits of the Poor Person's Procedure totally inadequate, and the more satisfactory arrangements for legal advice for the forces during the late war, have focussed attention on the need for similar arrangements for civilians. The professional bodies have been neither particularly gullible nor cunning; they have merely recognised the necessity and done their best to make a virtue of it. In the negotiations which have resulted in the final form of the Act they have earned the gratitude of the profession for the care with which they have watched its interests, but no one can fairly accuse them of attempting to subordinate public to sectional interests and the profession can take pride in the part which it has played in a useful piece of social and legal reform.

Unhappily, it seems that the Act is to be one of the victims of the economy axe and that the majority of its provisions are to be deferred. In reply to a question on November 14 last, the Attorney-General explained the effect of the postponement as follows [1]: 'People whose means are within the limits laid down by the Act will get legal aid under its provisions in proceedings in the High Court and Court of Appeal, and in the county court where a case is transferred there from the High Court. Solicitors and counsel in these cases will be remunerated under the provisions of the Act. The provisions of the Act in regard to legal aid in the

[1] 469 H.C.Dbs., p. 1663. This statement amplifies and slightly amends that in *Law Society's Gazette* for November, 1949, p. 356.

criminal courts and in the county courts and by way of appeal to the Privy Council and the House of Lords will be deferred, as well as those in regard to legal advice, but existing arrangements covering aid under the provisions of the Poor Prisoners' Defence Act and appeals *in forma pauperis* to the Privy Council and the House of Lords will continue'. This means that what are probably the most valuable parts of the Scheme (including the whole of the provision for legal advice) are still things of the distant future. In the light of experience of the National Health Service it is understandable that the Government should be unwilling, at the present juncture, to run similar risks of unforeseen expenditure, even though the expense of the Legal Aid Scheme can only be as a small molehill compared with the medical mountain, but if determined steps had been taken immediately to implement the recommendations of the Rushcliffe Committee the Scheme might have been in operation two years ago and it is difficult to believe that it could have had any seriously detrimental effect on our economic position. Those whose practical experience has proved to them the need for the Scheme will require further evidence before they are satisfied that economies in other directions could not have produced equal savings of public funds with less hardship.

However, a postponement of the major part of the Act may at least have two desirable consequences. In the first place it may enable the accumulation of divorces to be disposed of before the full Scheme commences to operate; this backlog of divorces is believed to be the factor most likely to swamp the new organisation in the first few years. Secondly, it may enable further consideration to be given to some of the less satisfactory proposals regarding legal advice.

The report of the Rushcliffe Committee, from which the Act sprung and the recommendations of which have been largely followed, was fully reviewed in Volume 9, p. 58 of this *Review* and subsequent developments have received so much publicity in legal circles that there is now no excuse for professional ignorance on the general nature of the Scheme. It is not, therefore, proposed to consider its provisions in any detail; the present need, as was pointed out during the Third Reading in the House of Lords, is for publicity in the lay rather than the legal press. Nevertheless, there are certain aspects of it which it is appropriate to refer to either because of their widespread implications or because they deviate from the original Rushcliffe proposals or have been subjected to particular criticism in the discussions which have taken place.

1. *Control.* Pursuant to the recommendations of the Rushcliffe Committee the Scheme is to be administered by the profession, that is to say, by the Law Society in collaboration with the Bar Council (section 8). Although this has met with general approval and is

in accordance with the evidence given by the Labour Party to the Rushcliffe Committee, the view has been expressed, particularly by the Haldane Society, that the public should be associated as closely as possible with the Scheme by having lay representation on the various administrative Committees. This suggestion has been strongly opposed by the professional bodies and has not been adopted. The arguments expressed against it are that laymen could fulfil no useful function on the Committees, that their presence would be objectionable as applicants would not wish to reveal their personal problems to their neighbours or to those not bound by the bonds of professional secrecy, and that if the profession is to accept responsibility for the working of the Scheme, it must be free from outside interference. There is much in these arguments and it must be conceded that laymen would be worse than useless on Certifying Committees and would have no part to play in many of the functions of the Area Committees. Nevertheless the complete exclusion of the 'consumer element' seems unfortunate and provides gratuitous ammunition to those who argue that the chief beneficiaries of the Scheme will be the lawyers rather than the public. The reluctance of the Law Society to contemplate lay representation on its Committee is no doubt partly accounted for by the fear that this would be the thin end of a wedge that might lead to a National Legal Service, but on the whole this may be a short-sighted view. Be that as it may, the only lay element will be that constituted by the Lord Chancellor's Advisory Committee, and if that were to be a really active body the objections would be largely met. It seems, however, that all this Committee is intended to do is to advise on any points submitted to it by the Lord Chancellor and to comment on the Annual Report on the Scheme submitted by the Law Society. This, it is submitted, is not enough; there should be some body, with a strong lay element, constantly watching the operation of the Scheme and submitting criticisms and suggestions.

2. *Legal Advice.* Arrangements for legal advice, as opposed to aid in litigation, are perhaps the most important part of the Scheme, but probably constitute the least satisfactory part of it. Modifying the Rushcliffe proposals, the Scheme envisages that Legal Aid Centres will be staffed by salaried solicitors, the majority of whom will probably be full-time employees. Their functions, however, will be limited to giving oral advice and assisting in completing an application for legal aid. Fears have been expressed that this restriction on the activities of advisers is likely to make it difficult to staff the Centres with the right type of lawyers, for a job which consists of giving advice with no opportunity of following it up is not likely to prove very inspiring. A further objection is that it will involve throwing away the valuable experience gained by the

present voluntary Poor Man's Lawyers. For this reason the London Council of Poor Man's Lawyers and the Bentham Committee have strongly urged that greater use should be made of part-time advisers, thus enabling those experienced lawyers who have undertaken this work in the past, to continue to lend their assistance to the State Scheme. There certainly seems room for such assistance, for if the need is to be properly met a considerable proportion of advice will have to be given in the evenings, which is the only time when many workers can conveniently seek assistance, and evening work would obviously suit part-time helpers but is unlikely to be popular with full-time employees. It is, therefore, to be hoped that before this part of the Scheme is brought into operation wiser counsels will prevail and that a place will be found for the present trained personnel who will undoubtedly give a better service than inexperienced and newly-qualified solicitors who alone are likely to be attracted by the offer of full-time employment.

As originally introduced, the Bill made no provision for the multiplicity of activities lying between oral advice on the one hand and aid in actual litigation on the other. This hiatus aroused a considerable outcry in well-informed legal circles and as a result two concessions were introduced during the Bill's passage through Parliament. The first of these is that the legal adviser at the Centre is to be permitted to give the applicant a written note of the advice tendered (section 7 (ii)). This is a more valuable right than might at first appear. One of the weaknesses of merely oral advice is that the applicant's bowdlerised account of it will cut little ice with the other party to the dispute (*e.g.*, the applicant's landlord). If, however, the applicant is given an official record of the solicitor's advice which he can produce to the other party, he will be placed in a much stronger position. The second, and even more valuable, concession is represented by section 5 which provides for the assistance of a solicitor in taking steps to assert a claim where the question of legal proceedings has not yet arisen. At first such assistance is to be limited to those applicants whose means would not make them liable to contribute anything towards costs (*i.e.*, those whose disposable annual income does not exceed £156 p.a., and whose disposable capital does not exceed £75 [2]), but it may be further extended by Regulation. The exact details of this arrangement will not be known until the Regulations are published but the Attorney-General indicated that the intention was that the Adviser at the Centre should in a proper case be entitled to grant an interim certificate entitling the applicant to select any solicitor on the panel who could carry on negotiations and correspondence on his behalf, provided he did not incur costs exceeding £15. The alternative solution, that the adviser at the Centre should himself be allowed to undertake this work, as many Poor Man's Lawyers do at present,

[2] Or, if married, £260 income and £150 capital.

was unfortunately rejected in the face of opposition from the provincial Law Societies. It is nevertheless believed that if the right type of practitioners are to be attracted to the jobs of advisers, sooner or later this latter solution will have to be adopted. In the meantime, in view of the vital need to ensure that the Scheme has the goodwill of the whole profession, the compromise solution is probably the best which is practicable, provided that it is speedily extended so that it is not limited to the poorest classes. Until such an extension takes place there is no doubt that in many parts of the country applicants will receive a far worse service than they are at present obtaining from voluntary Poor Man's Lawyers.

3. *Liability for Unassisted Party's Costs.* Under the Scheme the assisted party's maximum contribution in respect of his own costs will be assessed by the Assistance Board. He therefore knows what his maximum liability is in the event of his being successful, and in view of the careful scrutiny to which his claim will be subjected, it may be assumed that he will normally be successful. If, however, he is unsuccessful and an order for costs is made against him the position is different, for section 2 (2) (*c*) provides that his liability for such costs 'shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including the means of all the parties and their conduct . . .'. On the face of it this seems objectionable from the point of view of both parties. So far as concerns the assisted applicant it means that he can never be certain what his maximum liability is. In fact, however, this objection is likely to be more apparent than real, for, in the absence of any impropriety (in which event the Regulations to be made under section 12 will probably enable the aid certificate to be cancelled), it is likely that the tribunal will normally regard it as unreasonable for the applicant to be mulcted in costs to a greater extent than the maximum contribution assessed by the Assistance Board. But as regards the successful unassisted party the objection is very real indeed, for he knows that even if successful he has little prospect of recovering his costs. In these circumstances, the view was strongly expressed that his costs should be paid out of the Legal Aid Fund so that the State, which had backed the assisted party, should bear the consequences if it proved to have backed a loser. In equity there seems to be no answer to this argument but it is not perhaps surprising that the Government refused to contemplate the increased costs which this solution might entail. Under the circumstances there is little doubt that most cases in which one party is assisted and the other not, will be settled out of court, and if only for this reason it seems unlikely that the volume of litigation (except divorce) which comes before the court will be substantially increased as a result of the Scheme.

4. *Lawyers' Remuneration.* One of the great features of the Scheme is, of course, that lawyers will receive proper remuneration

instead of having to work for nothing, as under the present Poor Persons' Procedure. In county court cases they are to receive their full taxed costs (although whether these scales will be amended so that these are more adequate remains uncertain) but in the House of Lords and Supreme Court only their disbursements and 85 per cent. of their profit costs on a solicitor and client basis. This 15 per cent. reduction was readily accepted by the profession both because it is reasonable to grant a rebate for guaranteed payment and because most of us like to think that we are continuing to make some financial contribution. Those of us who objected to the reduction did so not so much in the interests of the profession but in the interests of the public, feeling it vital that the assisted litigant should have no grounds for thinking that he was not getting precisely the same treatment as an unassisted one. It seemed to us objectionable that the same office should deal with clients on two different bases of remuneration, thus inevitably leading the 'panel' clients to think, however unjustly, that they were not being treated in the same way as 'paying' clients. Unfortunately these objections, which may or may not be valid, were never properly argued in the Parliamentary debates. Nor was another suggestion that the solicitor for a successful assisted litigant should have the option of taking the full party-and-party costs recovered from the other side, thus putting him in a position to agree the costs without taxation. The present provision involves double taxation in every case, on a party-and-party and solicitor and client basis, and is likely to deter many solicitors from entering the Scheme, especially provincial solicitors most of whom are unfamiliar with such taxations.

5. *The Distinction between Civil and Criminal Cases.* The Rushcliffe Report recommended that aid certificates in civil cases should be granted by Certifying Committees and be subject to the possibility of financial contribution from the applicant, while legal aid in criminal cases should continue to be granted by the courts and be free. Some critics felt that the criminal aid scheme should be assimilated to the civil, but the Government remained faithful to the Rushcliffe proposals on the ground that the application of the civil scheme to criminal cases would be administratively impossible. In fact, the problem in the two types of cases appears to be completely different. In civil cases it is entirely for the parties to decide whether they want legal aid and the State merely intervenes if they reasonably require it and it is beyond their means; in criminal cases on the other hand, the public interest often demands that the accused should be legally represented. Nor, in such a case, would time normally permit of the assessment of means by the Assistance Board and the possibility of recovery from the accused would be somewhat remote, particularly if he were convicted. It is to be hoped, however, that the fact that aid is completely free will not make magistrates unduly reluctant to grant it; it has been

frequently pointed out that such a reluctance has in the past seriously militated against the success of the present facilities.

6. *Miscellaneous.* There are a number of other matters in respect of which the Act can be, and has been criticised. In particular one may regret that it is initially to be limited to assistance before the ordinary courts of law and that certain actions are to be excluded even so far as the defendant is concerned. Few will doubt, however, that on the whole the Scheme is a good one and an immense improvement on anything which has hitherto existed in this country. Happily, too, it is flexible and many imperfections can, and in due course will no doubt, be removed by Regulations. It will come into force with the goodwill of the whole profession, most of whom will undoubtedly participate in it and all of whom will hope that its complete implementation will not be too long delayed.

L. C. B. G.

CORRIGENDA

Vol. 12, p. 259, l. 21: for *equited* read *equated*
,, p. 352, l. 13: for *statement* read *statesmen*
,, p. 374, l. 15: for *breach* read *contract*
,, p. 405, l. 39: for *altered* read *unaltered*

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(2) *Constitutional Law.* F. R. Beasley: The exercise of judicial powers in the Commonwealth of Australia, 27 Can.B.R. 686. T. L. Blakemore Jr.: Recovery of Japanese nationality as cause for expatriation in American law, 43 Am.J.Int.L. 441. J. H. Davenport: The approach to world government through the technique of the world constitutional convention: American experience, 3 Miami L.Q. 500. K. C. Davis: Standing to challenge and to enforce administrative action, 49 Col.L.R. 759. W. J. Donovan and M. G. Jones: Program for a democratic counter-attack to Communist penetration of government service, 58 Yale L.J. 1211. W. O. Douglas: see (1). C. Fairman: Some new problems of the Constitution following the flag, 1 Stanford L.R. 587. R. C. Fitzgerald: Safeguards in delegated legislation, 27 Can.B.R. 550. W. I. Jennings: The making of a Dominion constitution, 65 L.Q.R. 456; (Ceylon). F. J. Myers: Limitation of debate in the United States Senate, 23 Temple L.Q. 1. J. C. O'Mahoney: Federal charters to save free enterprise, 1949 Wisc.L.R. 407. C. P. Patterson: The Supreme Court as a constitutional convention, 23 Tulane L.R. 431. Lord Schuster: The office of the Lord Chancellor, 10 Camb.L.J. 175. A. E. Sutherland, Jr.: Due process and disestablishment, 62 Harv.L.R. 1306. E. F. Waite: Jefferson's 'Wall of separation' what and where? 33 Minn.L.R. 494.

(3) *Administrative Law.* W. H. Brown, Jr.: Urban redevelopment, 29 Boston U.L.R. 318. K. C. Davis: see (2). R. C. Fitzgerald: see (2). L. L. Jaffe: Administrative findings or the Ameer in America, 34 Cornell L.Q. 473. W. Lowry: The Renegotiation Act: a study in government litigation tactics, 37 Calif.L.R. 382; readjustment of war contract profits. B. Schwartz: Administrative procedure and the Administrative Procedure Act, 24 N.Y.U.L.Q.R. 514. H. W. R. Wade: 'Quasi-judicial' and its background, 10 Camb.L.J. 216.

(4) *Family Law.* J. W. Bunkley, Jr.: The doctrine of recrimination in divorce law, 20 Mississippi L.J. 327. Z. Chafee, Jr.: Coming into equity with clean hands, 47 Mich.L.R. 877, 1065. Z. Cowen: Adultery and the privilege against self-incrimination, 65 L.Q.R. 373. M. F. Walsh: Marriage and civil law, 23 St. John's L.R. 209.

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W. A. Steiner.

CORRESPONDENCE

To The General Editor,

In 'Notes on recent Scottish Decisions' (12 M.L.R. 513), Mr. T. B. Smith writes: 'As on the Continent, so in Scotland "*unus testis, nullus testis*" '. I am not concerned with Scottish law, but with regard to Continental criminal procedure I find this statement somewhat puzzling, and it would interest me to know which Continental countries the author has in mind. Generally speaking, modern Continental Codes of Criminal Procedure follow the French principle of '*intime conviction*' which allows the courts more freedom of discretion in questions of evidence than does English law. The Carolina of 1532, that famous piece of legislation passed under the reign of the Emperor Charles V, required, it is true, at least two *testes classici* for a conviction (art. 67), and, in spite of many modifications in matters of detail, this remained a characteristic of the '*Gemeine Strafprozess*' in Germany up to the nineteenth century. In the course of the latter, however, the French conception was taken over by the legislation of the German States, and ever since I think it is true to say that the old law of evidence of the Carolina has been completely superseded in the principal continental countries by the principle of '*freie richterliche Beweiswürdigung*'.[1] It is perfectly legal, therefore, to base a conviction on the evidence of one single witness if he is regarded as sufficiently reliable.

Hermann Mannheim.

[1] For some details, see, *e.g.*, my paper on 'Trial by Jury in Modern Continental Criminal Law', L.Q.R., January and July, 1937, especially pp. 389 *et seq.*

NOTES OF CASES

Fresh Promises to Pay Wagers

The decision in *Hyams* v. *Stuart King*, [1908] 2 K.B. 696, has not had an easy life. At the outset it was subject to considerable criticism (see, *e.g.*, Professor Dicey 25 L.Q.R. 76), criticism which had recently been renewed in the Court of Appeal by Denning L.J. in *William Hill, Ltd.* v. *Rose* [1948] 2 All E.R. 1107 at p. 1112. Its reversal in *Hill* v. *William Hill, Ltd.* [1949] A. C. 530 can hardly therefore have been much of a shock to the bookmaking industry or to those few defaulting backers who considered their legal position.

The facts here were the usual ones, a defaulting backer and a promise to pay the lost bets (or an equivalent sum) in consideration of a promise to refrain from reporting non-compliance with an earlier order of Tattersalls to that committee. On this promise the action was brought and held to fail by a majority of the House of Lords. In effect the decision of the majority turns rather upon the wording of section 18 of the Gaming Act, 1845, than the logic of the majority in *Hyams* v. *Stuart King* in finding a fresh contract. There Gorell Barnes P., and most clearly Farwell L.J., had allowed enforcement of the new promise on the grounds that the sum in question was a fresh sum promised for new consideration and so outside the scope of the Gaming Act. This argument may sound specious particularly when, as is so often the case, there is a curious identity in amount between the sum promised and the sum lost, nevertheless some of the difficulties of its rejection are illustrated by Lord Oaksey in his dissenting opinion (at p. 568). The majority, however, while prepared to admit the new contract, said that this construction did not go far enough, the motive and substance of the contract must be considered. The emphasis is thus laid on section 18 which not only avoids gaming or wagering agreements but continues : ' no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager '. It was under the second arm of the section that the action failed. Despite the fresh promise and the fresh consideration the sum remained one ' alleged to be won on a wager ', since that was the primary purpose of the promise. The vice of its origin affected the new promise so that there seems to be a new maxim ' Once a wager always a wager '. The majority thus adopted a disjunctive construction of section 18, so that the second branch covers other transactions than those affected by the first. The minority of the House of Lords was content to find sufficient meaning for it as a

procedural reinforcement of the avoidance of wagering agreements (*per* Lord Jowitt, at p. 541) or to dismiss it as tautologous which, as Lord Jowitt pointed out, is no novelty in statutes in this context.

Thus to summarise the judgments of the majority is no doubt an over-simplification against which Lord Greene warned when he said (at p. 559): 'I must not be understood as suggesting that there can never be a case where a promise by a defaulting backer given in consideration of a promise by the winner of the bet not to report the default may be enforced'. Perhaps a promise to pay the actual costs of proceedings before Tattersalls would be an example but it is clear from their judgments that the difficulties of dissociating any sum of money from the lost bet are extreme. To quote Lord Greene again (at p. 559), 'The question what the agreement really comes to is a question for the tribunal of fact which will not be deceived by any specious attempt to conceal the real nature of the promise'. Thus the promise, even if expressly in the *Hyams* v. *Stuart King* form (as found by Farwell L.J.) would be ineffective as a 'patent and artificial device'. Similarly, Lord MacDermott regarded as critical the question whether as a result the gaming debt would be regarded as discharged (p. 574). The discussion of the interpretation of the phrase 'alleged to be won upon any wager' is therefore fundamental to the decision. At first sight one would perhaps have taken it in Lord Oaksey's sense —'alleged by the plaintiff and necessarily alleged as material to the action'—a sense rejected by the majority though they were not at one as to the true meaning. The effect of their conclusions is moreover made less certain by the fact that the plaintiff's pleadings did here disclose the nature of the promise. Lord MacDermott interpreted it as alleged by plaintiff or defendant and read it as 'alleged and proved or admitted' (p. 578) which, with respect, seems rather a wide gloss on the statute. Lord Normand relied on the disclosure in the pleadings before him (p. 565), while Lord Simon appeared to make a like reliance and to doubt whether the section could cover cases where the defect was not apparent from the plaintiff's pleadings (p. 549). Lord Greene seemed by his insistence on the true nature of the agreement to share the wider view, though the cases he discussed are those where the pleadings do not match the agreement.

It does not seem, therefore, that the present case has necessarily ruled out the possibility of a successful action where the promise is on the face of it to pay a sum of unspecified origin, or where the promise is under seal mentioning neither origin nor consideration. It is true though that the weight of dicta of the majority are against such actions but greater doubt exists where the thing promised is not money but some valuable object, *e.g.*, a horse. The difficulties of refusing enforcement here were noticed by Lord

Simon (at p. 551), since the thing sought is not that 'won upon a wager' and the difficulties of differentiation in connection with sums of money do not here arise. It may, of course, be that such contracts will fall within Lord Greene's category of 'patent and artificial devices', but it does not seem to follow necessarily from the present decision.

The majority reading of section 18 does, however, seem to render hopeless any attempt as in *Day* v. *William Hill* [1949] 1 All E.R. 219 to sue a bookmaker or backer on an account stated even if such a hope had been real after *Morgan* v. *Ashcroft* [1938] 1 K.B. 49. Similarly it seems that gaming debts incurred abroad can certainly never be sued on here. So long as the two parts of section 18 were regarded as complementary it was possible to contend that the second part was like the first only of local effect, but now the second part appears an independent procedural direction binding an English court irrespective of the origin or proper law of the contract. The views of the learned editors of Dicey's *Conflict of Laws* (6th ed., p. 611) seem therefore preferable to those of Dr. Cheshire given in his *Private International Law*, 3rd. ed., pp. 351–352. At its widest the reasoning of the majority will equally prevent the enforcement here of foreign judgments for gaming debts whether registrable or not.

Since this is a decision of the House of Lords any discussion except of its effect would be misplaced even though the opinions of the minority be cogent. One effect which may be unfortunate, as was shown by Lord Oaksey (p. 569), is that the loser even though he has paid under the second agreement (what will normally, as here, be something less than the bet) is left without remedy if the default proceedings are continued on the principle of *Vanbergen* v. *St. Edmunds Properties* [1933] 2 K.B. 223. Another difficulty may lie in the differences of opinion among the majority which have been discussed and affect the scope of the decision in relation to these promises. It would indeed be a double misfortune if after an uncertain life *Hyams* v. *Stuart King* should have met a doubtful death. Indeed one is tempted to wonder whether the public policy of the unenforceability of wagers which underlies the statute is sound. Two centuries of such legislation have done nothing to lessen the flood of wagers but have resulted in a mass of technicalities and evasions. If betting is to be discouraged perhaps it is time that enforceability should have another turn.

J. D. B. MITCHELL.

CASUS OMISSI IN COMMERCIAL AND INDUSTRIAL LEGISLATION

THE principal legal concern of the commercial case, *Podar Trading Co., Ltd., Bombay* v. *François Tagher, Barcelona* [1949] 2 All E.R. 62, was whether a commercial arbitrator retained a statutory

power of awarding interest on damages since the passing of the Law Reform (Miscellaneous Provisions) Act, 1934. The Divisional Court held that he had not: the statutory power previously possessed had been repealed by section 3 (2) of the 1934 Act, and had not been replaced owing to an obvious oversight in the final draft of the Act. For, whereas section 11 of the Arbitration Act, 1934, governs only the period for which an arbitrator may award interest on damages, but says nothing to confer on him a power to award, section 3 (1) of the Miscellaneous Provisions Act confers a power to award on 'any court of record', but fails to provide for the arbitrator. The latter, consequently, finds himself embarrassingly seated between the two stools.

Apart from statute, the power to award may still be exercised by the commercial arbitrator in three cases: (1) 'Parties can . . . agree to accept the decision of an arbitrator on a question of law or agree that he may do what he thinks fair in any particular case, and, if an arbitrator makes an award which is not bad on its face and no application has been made to him for a Special Case, or he does not seek the guidance of the court or put his award in the form of a Special Case, the court will not review his finding although he may have proceeded on a wrong principle of law' (at 66); or (2) by express contract; or (3) by mercantile custom, though the practice of an association as opposed to a trade would bind association-members only. For existing contracts and pending disputes, then, commercial litigants may possibly, by mutual consent, adopt course (1) to circumvent the present difficulty. For future contracts, method (2) alone is probably reliable; since, so far as (3) is concerned, there may be many a slip between the belief that a custom exists and proof of its existence. If, where present standard terms and contracts fail to confer the necessary power, the amendment of such documents would prove over-laborious and over-expensive, the commercial community will be justified in expecting speedy legislative reform. This might easily be effected by the insertion of a short enabling section in any forthcoming commercial statute.

* * * * *

The industrial case, *Donovan* v. *Cammell Laird & Co., Mersey Docks and Harbour Board and Alfred Holt & Co.* [1949] 2 All E.R. 82, involved the interpretation of certain of the 'Duties' laid down by the Shipbuilding Regulations, 1931. The facts were briefly these: a ship belonging to the Crown was being repaired, along with another ship, in a public dry dock owned by the Harbour Board. Three main contractors were at work on the ship, including the first defendants as contractors for the French Government, and the third defendants who, as managers of the ship for the Crown, had sub-contracted out certain repairs on the

Crown's behalf. The plaintiff was an employee of the first defendants. The latter's area of work encompassed the lower 'tween deck, the surface of which was broken by two tank tops that sloped in obliquely on either side towards the deck-centre. Contrary to reg. 10 of the Shipbuilding Regulations, both tank lids stood open throughout the duration of the work. The third defendants had erected a stanchioned and effective life-line around the starboard tank-opening; but, at the material time, this line was uselessly slackened off through the negligence of the first defendants. The plaintiff's tools lay beyond the open tank lids. In collecting them, instead of taking the safer and longer route around the tanks, he thoughtlessly—as it was held—passed down between tank-openings, and, on his third journey, stepped into the starboard tank.

The major issues were the liability of the employers at common law for failing to establish a safe system of work, and the liability of all plaintiffs for breach of the Factories Act, 1937, s. 26 (1), and of the Shipbuilding Regulations. The plaintiff succeeded under the first head alone.

To begin with, then, the case illustrates the important supplementary function fulfilled in industrial accidents by the wide residuary duty to one's 'neighbour' which the common law applies to situations generally. A careful employer ought to have contemplated that an unprotected opening so near a place of work was a probable source of danger. Here, the employer had, by loosening the life-line, created the source of danger and had made it nobody's business to rectify that state of affairs. Consequently, the employer had failed in his duty to take care for the safety of his workmen. The plea of contributory negligence—a difficult one in workmen-cases—failed: the plaintiff 'had not got his mind fully on what he was doing' (86), he might have taken another and safer route, but there was no contributory negligence. There had been merely 'a momentary lapse from alertness such as might affect the ordinary, prudent workman of his grade' (at 86).

Secondly, there had been no breach of the Factories Act, since safe means of access to work had in fact been made available.

The relevant provisions of the Shipbuilding Regulations run: 'It shall be the duty of the occupier to comply with Parts I to VIII of these regulations. Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair shall be deemed to be the occupier for the purposes of Part I to VIII and it shall be his duty to comply with the said Parts, except as follows: . . . (6) Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master, or officer in charge, to provide the protection specified in reg. 10 in so far as concerns those hatches or openings

which are not required to be used for the purposes of the repairs, but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable '.

Devlin J.'s decision on these regulations affords a most interesting example of the combined application of the Literal and Mischief Rules of statutory construction, the former being tempered and governed by the latter.

The Secretary of State's intention in promulgating these regulations was to provide for the full range of situations involving dockyard occupiers, shipowners and ship-repairers; but the draughtsman had fallen short of these requirements on the literal meaning of the words used. Commencing with the proviso, Devlin J. described its stultified scope in the following terms: ' The trouble is that the draughtsman has legislated only for an assumed state of affairs in which more than one ship is never being repaired in a dry dock at the same time, and in which a shipowner never repairs his own ship and no-one repairs it except under contract with him, and he never contracts with more than one person at a time '. Therefore, relatively to a situation like that in the present case, the proviso failed to indicate either the first or third defendants as ' notional occupiers ' to whom liability might be affixed.

Was the Harbour Board, then, as ' occupier ' of the dry dock, liable in the absence of any notional occupier within the meaning of the regulations? Literally, the Board was so liable; for, there being no notional occupier, the protection of the proviso failed to operate. But, at this point, the logic of the Literal Rule was turned back: if liability were thus imposed on the Board such liability would result from a verbal accident, in contradiction to the accepted intention of the regulations. On the other hand, though Devlin J. was prepared to recognise the Secretary of State's general intention, the learned judge was unprepared to specify by way of judicial amendment what view the Secretary would have taken of a state of affairs lying outside the verbal frame of the regulations. The English judge, unlike the Swiss, could not sit as a legislator to fill the gap in statute law. Hence, no liability adhered to the Board, as the circumstances of the case were held not to be covered by the regulations.

The reason for fixing the precise point at which the Mischief Rule took over from the Literal is not stated in the judgment. The principle of selection must apparently be found in judicial policy; it is the inevitable and empirical margin of judicial discretion inherent in the interpretation of any doubtful statutory provision. The choice here may also have been influenced by the alternative ground on which this part of the decision rested: namely, that an ambiguity or uncertainty in penal legislation

moves in favour of the defendant, even though the action brought be a civil one.

Turning to the liability of the ship's managers, whom the learned judge assumed to be the owners for the purpose of the regulations, the pattern of reasoning resembled that just described. Literally, the third defendants were liable : the first defendants had not contracted with the third defendants, nor, for reasons already given, could they be regarded as ' the occupiers ' within the proviso to exception (6). Literally, then, the proviso failed to protect the owners. However, the literal verbal interpretation was again made to yield to the underlying assumption of the regulation, *viz.*, that a ' main repairer ' would always be ' the occupier ', so that, where the fault of the repairer contributed to the injury suffered, owner and repairer might divide the consequent loss. The present case posed the uncontemplated contingency of a main repairer who was not the occupier; and the learned judge refused to speculate upon the provision the Secretary of State would have made for this contingency. A firm boundary was preserved between the judge's function of interpretation and the delegated-legislative function of the executive.

Alternatively, again, this was a case of doubt in a penal provision.

Though the technical rectitude of the decision is beyond dispute, the question of its practical wisdom invites a few additional remarks. For the most part, the workman is protected under the regulations; even if the life-line had not been slackened, he would have been successful against the owners. But, the relationship of dockyard occupier, shipowner and ship-repairer *inter se* remains in an unsatisfactory condition. For them the regulations under discussion have, save in the narrowest set of circumstances, become a dead letter. But the fault lies with Parliament, not with the learned judge. Looking at the decision from a wider viewpoint, it may be said that it was not for the learned judge to re-shape the regulations for two reasons : first, because a strict adherence to the rule of interpreting penal statutes is of overriding importance as a salutary check on executive action; and, secondly, because, on balance, it appears more desirable that specialised legislation should be altered after mature reflection by the appropriate experts than that alterations should be made by impromptu judicial amendment.

C. GRUNFELD.

VALUED FIRE POLICIES

IN *Elcock and Another* v. *Thomson* [1949] 2 K.B. 755 a new point on the law of fire insurance, and one which may become of increasing practical importance, came before the court. The policy under discussion was a ' valued ' policy, the agreed value

of the property being £106,850. A fire occurred which caused a partial loss, the cubic content of the portion burnt being some 21 per cent. of the whole. The actual value of the property immediately before the fire was £18,000, and its value after the fire was £12,600. On the other hand, the cost of reinstating the property would have been (with fees) £43,252, and the cost of erecting new buildings of the kind existing before the fire would have been £205,000.

The plaintiff put his case in three ways. He claimed (i) the difference between the agreed value and the value after the fire, or alternatively (ii) a percentage of the agreed value equal to the percentage depreciation in value shown by comparing the actual value after the fire with its value beforehand, or alternatively (iii) the cost of reinstatement. The insurer claimed that the amount for which he was liable was limited to the actual depreciation in value or at the most to a percentage of the agreed value equal to the percentage which the cost of reinstatement represented of the cost of constructing new buildings : it will be observed that each of these suggestions treats the fact that the policy was valued as irrelevant. No one seriously contended that the claim could be adjusted at a proportion of the cubic damaged portion to that undamaged. The court held that the plaintiff's second alternative gave the correct measure of indemnity.

It is a little strange that there should have been no authority in the law of insurance as to the correct method of adjusting a partial loss in the case of a claim on a valued policy. But the valued policy, other than on such items as pictures or jewellery, has been a latecomer in the field of non-marine insurance. The standard work on the law of fire insurance is *Bunyon*, of which unfortunately there has been no new edition since 1913. He states that such policies are not in general use, and apart from a reference to the marine case of *Lewis* v. *Rucker* (1761) 2 Burr. 1167 he does not discuss the problem. *Macgillivray* (1947) is even more reticent, and hardly refers to ' valued ' policies at all.

Prima facie one would expect that the value agreed by the parties as being the value of the insured property would have to be taken as the value for all purposes in connection with measuring the indemnity payable by the insurer whether the loss sustained were total or partial. The defendant argued, however, that in marine insurance the valuation is only conclusive in cases of total loss and does not provide a basis of liability in cases of partial loss. There was undoubtedly at one time a view held among maritime lawyers to that effect, but according to *Arnould on Marine Insurance* (12th ed. § 340) it has ' long been established that a valuation has precisely the same effect in cases of particular average as it has in cases of total loss, *viz.*, to relieve the assured from proving the prime cost, or insurable value '. And this view is explicitly adopted by the Marine Insurance Act, 1906 (s. 27 (3)).

The statement in this section is, however, made expressly subject to the provisions of the Act; and the defendant argued that in a case of this kind section 69 (3) laid down a different measure of adjustment. It states that in cases of unrepaired ships 'the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage . . .'. It will be observed that this section makes no reference to valued policies, but on the construction of the words there does not seem to be any good reason why in estimating the 'reasonable depreciation' regard should not be had to the agreed value. But a later section (71 (3)), which deals with goods only, lays down a measure of indemnity based on such proportion of the sum fixed by the policy in the case of a valued policy as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value, and the insurer argued that since this method is expressly applied to policies on goods it must be taken that it was the legislature's intention that it should not apply to hulls. Actually since the draftsman's job was simply to put the existing law into the statute it appears more probable that the distinction between the case of a ship and the case of cargo was made because the latter was covered by a decided case, that of *Lewis* v. *Rucker* (cited *supra*).

It is perhaps relevant though it does not appear to have been proved in evidence that the practice of marine average adjusters has long been to ignore the valuation in the policy when dealing with partial losses and to allow what they consider to be the depreciation reasonably resulting from the casualty subject to its not exceeding the estimated reasonable cost of repairing the damage. This practice does not appear to have ever been directly considered by the courts, and is perhaps contrary to the views expressed in *Pitman* v. *Universal Marine Insurance Co.* (1882) 9 Q.B.D. 192, and *Balmoral Steamship Co.* v. *Martin* [1902] A.C. 511.

In the instant case Morris J. appears to have been influenced by the opinion of Lord Lindley in the cases just referred to, and indeed if the marine insurance law on the matter was clear there would be good reason for applying it to a fire policy, since with few exceptions the principles of marine insurance have been generally accepted as applying in other branches of insurance. Morris J. considered that the same rule ought to apply in adjusting losses on hulls as applies in adjusting losses on goods, and evidently thought that there was much to be said for applying, as far as practicable, a uniform rule in all types of insurance, and indeed there is a great deal to be said for the adoption of such a policy, though it is not likely to find favour in the marine market. If he was right in holding that the measure of indemnity must depend on the valuation in the policy it certainly follows that he could

not accept either of the defendant's contentions as to the method of arriving at the correct measure.

It may be added that normally on a partial loss by fire the amount payable under the policy is measured by the depreciation in the market value of the property, which is the difference between the value before and after the fire. This in the case of buildings is most commonly arrived at by calculating the damaged value on a basis of deducting the cost of repairs from the repaired value (see *Macgillivray*, Chap. XI, I (2)). It might at first sight be thought best to take the actual cost of the repairs but this ignores the fact that the repaired value is not necessarily the same as the undamaged value, and does not therefore furnish a proper measure of indemnity. Morris J., in the instant case, seems to have considered that had repairs been actually done their cost might well have been payable by the insurers, but it is submitted that that would not be a correct view, and in any case it disregards the fact that the policy was valued. In marine insurance, however, where the insurable value is taken as at the time of the policy and not at the time of the casualty, the cost of repair is taken as the measure (Marine Insurance Act, 1906, s. 69 (1)), though it must be borne in mind that the section makes no reference to valued policies.

But the ordinary method of adjusting a partial loss after fire does not afford any guidance in the case of a valued policy unless, as was contended by the insurer in the instant case, the valuation can be disregarded in the case of a partial loss. Quite apart from the considerations against this contention already advanced above, it would seem to be quite wrong when an insurer has paid a premium, possibly for many years, on the basis of an agreed value he should then be thrown back on the actual value when making his claim. Since total loss of buildings by fire is comparatively rare, such a view would mean that in practice the assured, though he always paid the full premium, might often get a very small indemnity. If values had gone up he might of course get more than an indemnity, but the whole object of valued policies is to avoid market fluctuations and the difficulties of estimating loss in the circumstances of such fluctuations. The ratio decidendi adopted by Morris J. seems to be that best calculated to secure a just result.

C.

'Interpretation' and 'Policy'

John Lee and Son (Grantham), Ltd. and Others v. *Railway Executive* [1949] 2 All E.R. 581, C.A., is of general interest beyond the narrow point of contractual construction which was before the court. The first plaintiffs were the tenants of a warehouse rented in 1939 from the railway company who were the defendants' predecessors in title, and the second plaintiffs were (apparently) the

owners of goods stored there. The warehouse was situated 'in the middle of a number of railway sidings and railway properties near Grantham'. The plaintiffs alleged that goods stored in the warehouse had been damaged by fire caused by sparks ejected from a railway engine as a result of the negligence of the defendants' servants. The defendants pleaded, inter alia, that they were exempted from liability by a clause in the tenancy agreement by which the tenant was to be responsible for and undertook to 'release and indemnify' the company, their servants and agents 'from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss damage costs and expenses, however caused or incurred . . . which *but for the tenancy hereby created* or anything done pursuant to the provisions hereof *would not have arisen*'. The words which confronted both Streatfeild J. [1949] 2 All E.R. 230, and the Court of Appeal with what the Master of the Rolls called a 'question of considerable difficulty' were those here printed in italics. Did these words mean that the exemption from liability and the right to indemnity covered all those cases in which, had it not been for the existence of the tenancy, there would have been no occasion for the accident? Or were they intended 'to be confined to liabilities which only arise by reason of the relationship of landlord and tenant'? Both Streatfeild J. and the Court of Appeal answered this question in the latter sense, *i.e.*, in a sense favourable to the plaintiffs, although their lines of reasoning were somewhat different from each other. This is a satisfactory solution of a problem created by the wording of a perhaps rather unusual clause in an agreement of this kind, and if this was all there would have been hardly any justification for discussing the case in this *Review*.

The case does, however, raise in a most interesting form the perennial problem of the borderline between judicial interpretation and judicial control of the freedom of contract. One may suspect that 99 out of 100 non-lawyers when confronted with this clause would have rejected the construction adopted by the Court of Appeal. It is a matter of common experience that laymen are apt to be far more legalistic than lawyers in matters of this kind. The reason for this phenomenon, it is submitted, must be found in the fact that the non-lawyer and especially the businessman is inclined to ignore the 'normative' element which enters into the mental process known as 'interpretation'. The non-lawyer is inclined to take *au pied de la lettre* the assertion of the courts that, when construing a document, they do no more than try to ascertain the intention of the parties in so far as it has found expression in the written or printed word. The corrective function of judicial interpretation is familiar to every lawyer. Its limits cannot be defined, they can only be 'felt', and this may be one of the main reasons why experience, the 'feel' of things, counts for so much

more in the practice of the law than the theoretical knowledge of formulated rules. In the instant case it was plain that the court decided as it did because the construction contended for by the defendants would have yielded results which the Master of the Rolls rightly, it is submitted, characterised as ' most remarkable, if not extravagant '. The parties ought not to have made an agreement of the kind contended for by the defendants and so they were held not to have made it. That ' public policy ' plays a comparatively insignificant role in the English law of contract, can only be understood if it is realised that its function is largely performed by judicial interpretation. Interpretation is, to some extent, a matter of judicial policy. As a result, perhaps, of the dominant role of natural science in the mental make-up of our age, this inextricable mixture of the ' fact finding ' and the ' teleological ' elements in the judicial process appears to be something which most people (and, in the writer's experience most students, especially the ' good ' ones) find it almost impossible to grasp.

All this has been said so often and so much better, especially in America by Holmes, Cardozo and Llewellyn, that it would be almost presumptuous to reiterate it here if it were not for the judgment of Denning L.J., who made it explicit. After expressing his agreement with the interpretation adopted by his colleagues and supplying further arguments for this interpretation, the learned Lord Justice continued :

> ' If the wide construction contended for were correct, there would be a serious question whether a contract in such wide terms would be enforced by the courts. There are many provisions in the Railway Acts which restrict the freedom of contract of railway companies. . . . Above all, there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused. It would therefore be a very serious question whether the defendants are free to exempt themselves in the wide terms which are here contended for. It seems to me preferable that a limited construction should be put on the clause so that it should be valid, . . . '.

To be sure, this is no more than an obiter dictum. Moreover, one may be permitted to doubt whether the common law has in fact, in the long course of its history, especially during and since the industrial revolution, been sufficiently ' vigilant ' in preventing abuses of the freedom of contract. It is, however, noteworthy not only that the need for this watchfulness is beginning to be emphasised again, but also that the close connection between public policy and interpretation is made articulate. ' Positivism ' is dead, but it can do no harm if the courts write their own contribution to the epitaph.

O. Kahn-Freund.

MATRIMONIAL CAUSES—CRUELTY AS RESULT OF INSANITY

White v. *White* [1949] 2 All E.R. 339 is a case of quite exceptional interest. The facts briefly were that the wife had persistently treated the husband in a manner which would normally have constituted cruelty. On the other hand it must have been apparent to the husband that she was mentally unstable, although so far as third parties were concerned, she behaved normally and was even able to earn money as a receptionist to a chiropodist-osteopath. The husband eventually left her and about seven months later filed a petition for divorce on the ground of cruelty. Six months later and before the case was heard, the wife was certified insane and admitted to a mental hospital. The Official Solicitor, as the wife's guardian *ad litem*, defended the petition on the ground that she was not guilty of cruelty, because her acts of violence were due to mental illness. This defence prevailed before the Commissioner, but the husband's appeal was upheld by the Court of Appeal, whose decision was unanimous, although the learned Lords Justices differed in their reasoning.

Asquith L.J. held that the proper test was whether at the time of the acts of cruelty the wife was so insane as not to know what she was doing or, if she did, not to know that she was doing wrong. In other words he expressly introduced into divorce law the M'Naghten Rules relating to criminal responsibility—or rather the first two of such rules, for nothing was said about the third (relating to insane delusions) which, indeed, seems to be becoming a dead letter in criminal cases also.

This is not the first recent example of the reception into matrimonial cases of criminal law rules; another illustration was *Ginesi* v. *Ginesi* [1948] P. 179 relating to the burden of proof of adultery, which did not go uncriticised (see, *e.g.*, 11 M.L.R. 344). Denning L.J. in the instant case made it clear that he was 'averse from introducing the tests of the criminal law into the civil code' (p. 352) and held that insanity was never a defence to a charge of cruelty, at any rate unless the injured party knew that the other was of unsound mind. This qualification will be dealt with later; for the moment it is desired to point out that the difference between Asquith L.J. and Denning L.J. on this question is based upon a fundamentally different approach to the whole question of divorce. The former adopts the traditional punitive theory under which the 'guilty' party is punished for an offence. If this view is taken, it is logical and reasonable to adopt criminal law conceptions. Denning L.J., on the other hand, expressly adopts a more modern approach, holding that the object of matrimonial relief is not to punish the respondent but to relieve the petitioner and 'the presence of mental disease makes this relief more and not less necessary' (p. 351).

The third member of the Court (Bucknill L.J.) held that as the

wife was not insane within the M'Naghten Rules, she had no defence and he left open the question upon which his colleagues had disagreed.

From every point of view, the opinion of Denning L.J. appears preferable on this point; in principle because it is based upon a sounder conception of the basis of divorce, and in its social consequences because it goes further towards removing the undoubted hardships caused by the excessively stringent conditions which have to be fulfilled before divorce can be obtained on the ground of insanity. On the other hand, it is important that we should not allow sympathy for the husband or wife of the insane to persuade us to grant a divorce on the grounds of cruelty as a means of circumventing the rules relating to divorce for insanity. It is obviously objectionable if a spouse who would normally have to wait until after five years' detention and then prove incurable insanity can proceed immediately if the lunatic assaults him while in an insane fit. It was probably with some such idea in mind that Denning L.J. suggested that it might be a defence if the other spouse knew of the insanity at the time. He pointed out that it is settled law that a person of unsound mind is liable on his contract unless the other party, at the time of the making of the contract, was aware of his incapacity. He further suggested that ' in the case of torts such as trespass and assault it is also settled that a person of unsound mind is responsible for wrongful conduct committed by him before he was known by the injured party to be of unsound mind . . . and this is so even if the mental disease was such that he did not know what he was doing or that what he was doing was wrong '. From this he argued that it was similarly no defence except in matrimonial offences demanding a specific intent (*e.g.*, desertion (*Williams* v. *W.* [1939] P. 365), which cruelty does not (*Squire* v. *S.* [1949] P. 51)).

This argument, however, cannot be regarded as convincing. In the first place, the rule regarding the other party's knowledge is only relevant, in cases of contract, as regards the initial creation of the contract, and this bears no similarity whatsoever to dissolution of marriage. A closer analogue is the effect of insanity in discharging a contract or as a defence to an action for breach, and as regards these, the knowledge of the other party seems to be immaterial (cf. *Yonge* v. *Toynbee* [1910] 1 K.B. 215 and the Scottish case of *Liddell* v. *Easton's Trustees* 1907 S.C. 154 in which supervening insanity was held to discharge a contract *to* marry). An even closer analogue is, of course, an action in tort for assault or the like, and as regards this it is certainly an overstatement to suggest that it is settled that a similar rule applies. So far as the English courts are concerned there is no binding authority and Denning L.J. had to rely on obiter dicta mainly of the seventeenth century, and on American and New Zealand decisions. Moreover, these in no way support his suggestion that

the knowledge of the other party is a relevant factor. Except in cases of fraud, where such knowledge may destroy one of the essential elements of the tort, it is surely obvious that the knowledge of the injured party as to the tortfeasor's mental condition must be completely immaterial. It would only be relevant if such as to enable *volenti non fit injuria* to be pleaded.

It is suggested that this defence of *volenti non fit injuria* (as opposed to mere knowledge) may be the solution to the problem of restricting Denning L.J.'s suggested rule within safe limits. If a wife goes on living with her husband knowing him to be a raving and violent lunatic, she can scarcely complain if he knocks her about, and her only ground for matrimonial relief should be insanity. If, however, his insanity has taken some non-violent form (for example, an insane delusion that he is a divine being) and he suddenly assaults her, she should not be debarred from petitioning on the ground of cruelty because she knew of his mental instability or because he may have been insane within the M'Naghten Rules (which might well be a question of some difficulty in the example quoted).

It is therefore submitted that the M'Naghten Rules and the doctrine of *scienter* should be left where they belong—in the law of criminal responsibility and of liability for animals respectively—and that neither should be extended to divorces. In the twentieth century the law should be able to deal with broken marriages without treating the parties as criminals or domestic animals.

It is also interesting to note that Denning L.J. would have rejected the M'Naghten Rules even if he had been prepared to hold that insanity was a defence to a charge of cruelty. He described them as 'an unscientific test which is not applied even in criminal cases by the Home Office doctors who often have the final word on the matter' and he suggested that irresistible impulse should also be a defence as recommended by the Report of the Atkin Committee in 1923. It seems, however, that the panel of prison medical officers which recently gave evidence before the Royal Commission on Capital Punishment did not altogether support the learned judge's strictures. According to the report in *The Times* newspaper (November 4) one of these doctors said that the Rules 'are very good rules and I cannot conceive of any better'. This rather surprising testimonial was, however, qualified by the assumption that in practice the Rules are taken as a guide rather than as a narrow definition of responsibility, and that once the probability of disease of the mind is established the jury find little difficulty in arriving at a verdict of guilty but insane. In this respect the doctors' evidence supports Denning L.J.'s argument, for he, too, suggested that in the case under consideration a jury would in fact have found the wife to be insane. In other words, medical opinion only supports the M'Naghten Rules if they are applied as a rough guide by a common-sense jury. If they are to be extended to

divorce cases and applied strictly by the judge, the result in practice will not be the same as that in criminal cases, nor such as the medical profession would approve.

L. C. B. Gower.

Fresh Evidence on Appeal

Two recent cases where fresh evidence was sought to be introduced upon appeal, have served to draw attention to the fact that in this respect totally different considerations must clearly apply in civil and in criminal proceedings.

In *Braddock* v. *Tillotson's Newspapers, Ltd.* [1949] 2 All E.R. 306, the appellant wished to recall one of the chief witnesses for the respondents in order to cross-examine him as to credit, because it had, since the trial, come to her knowledge that he had been previously convicted on charges involving dishonesty. There is no doubt that the relevant questions could quite properly have been put to this witness at the trial, nor that they might have made a considerable impression on the jury. Although no case seems ever to have occurred in which the Court of Appeal has been asked to admit fresh evidence going to credit only, Tucker L.J. had little hesitation in saying that under R.S.C., O. 58, r. 4, the court possesses discretionary power to receive evidence of this kind. In rejecting, none the less, the appellant's application for leave to adduce this further evidence, because, as Singleton L.J. put it, it could 'not be said positively, or with any degree of certainty, that the verdict would have been a different one' if the jury had known of the witness's previous convictions, all three appeal judges stressed the necessity for finality in litigation which has always been recognised as a paramount consideration in civil cases, even if it involves some degree of hardship to one of the litigants. Appellant relied upon *R.* v. *Hamilton* (1917) 13 Cr.App.R. 32, where a witness for the prosecution had given false evidence about his own person and position and was allowed to be recalled before the Court of Criminal Appeal. In *Braddock* v. *Tillotson* the court agreed that *R.* v. *Hamilton* could not be regarded as an authority in the Court of Appeal, there being a clear and essential distinction between criminal and civil matters. Indeed, proof that the desire *ut sit finis litium*, which applies in civil matters, must give way in criminal cases to the dominant consideration that no innocent man should suffer conviction, is already found by comparison between R.S.C., O. 58, r. 4, and the powers conferred by the Criminal Appeal Act, 1907, especially section 9, which are expressly stated to be additional to those exercised by the Court of Appeal in civil matters.

That even these provisions may not always be sufficient to protect the innocent prisoner must occur to anyone reading *R.* v.

McGrath [1949] 2 All E.R. 495, where justice was eventually only done after interference by the Home Secretary. In this unusual case the prisoner was charged and convicted of receiving, the jury having disbelieved his defence, an alibi. For some reason which does not appear from the report, a most material witness in the prisoner's favour had not been called at the trial, but the Court of Criminal Appeal rejected the appellant's application for further evidence to be received and dismissed the appeal, on the ground that it had not been shown, or even suggested that 'the proposed witnesses were not available at the trial, or that some point which could not have been foreseen arose at the trial on which the evidence would have been material'.

The prisoner would thus have served sentence of three years' penal servitude had it not been for the fact that, in the exercise of the royal prerogative of mercy, the Home Secretary had caused further investigations to be made and referred the case once again to the Court of Criminal Appeal under the Criminal Appeal Act, 1907, s. 19 (*a*). The fresh evidence was now admitted and since it tended to establish the prisoner's alibi and to show that his identification by two police officers had probably been mistaken, the sentence was quashed. As Lord Goddard C.J. was at pains to point out there was no question but that the prisoner had throughout had a perfectly fair trial. Even assuming, however, that the failure to call the relevant evidence in time was due to an error of judgment on the part of the prisoner and/or his counsel, it is a somewhat sobering reflection that only by a petition for mercy can the prisoner in such a case, or in a case where fresh and decisive evidence has been discovered after a conviction has been affirmed on appeal (or the time for notice to appeal has expired), still hope to obtain justice.

Clearly where there is any real danger that an innocent man may be suffering sentence for a crime which he has not committed, it should never be too late to re-open the issue. It might well be argued that power to do so, in a proper case, *at any time*, should be in the hands of the courts, not only upon reference by the Home Office, but also upon the application of the defence. Surely it cannot have been the desire *ut sit finis litium* which induced the framers of the Criminal Appeal Act, 1907, to omit provision for any procedure such as the French 'pourvoi en revision' (art 443[IV] C. Inst. Crim.) at the instance of the prisoner?

H. A. HAMMELMANN.

THE AUSTRALIAN BANK NATIONALISATION CASE

THE Privy Council decision in *Commonwealth of Australia* v. *Bank of New South Wales* [1949] 2 All E.R. 755 wrote an end to the most determined challenge, so far, to private vested interest

in Australia. This *cause célèbre* is, on any showing, without precedent in Australian constitutional history. Two points were at issue : First, the preliminary question of jurisdiction—whether an appeal lay to the Privy Council without a certificate of the High Court; and, secondly, the substantive issue—whether section 46 of the Banking Act, 1947, which empowered the Commonwealth to prohibit private banking infringed section 92 of the Constitution. The Privy Council found against the Commonwealth on both points : its reasons for adopting the unusual course of deciding the substantive issue were expediency and principle.

It is impossible to unravel the formidable jurisdictional issue within a brief note. Two short points, however, may be made : First, the Privy Council's earlier order granting special leave to appeal subject to the respondent's right to raise, as a preliminary point, the jurisdiction of the Council, is somewhat anomalous. The disposal of the jurisdictional question is surely a precondition of the Privy Council's right to grant special leave. It may be expedient to grant special leave where it is impossible to decide the ' inter-se question ' (*i.e.*, the issue on which the jurisdiction of the Council hinges) unless the substance of the appeal is heard. But whether this expedient is permissible under section 74 of the Constitution—the section regulating appeals to the Privy Council from the High Court—is dubious. On the interpretation of section 74 itself, the Privy Council's decision that a certificate of the High Court is essential in every case in which an inter-se issue *may* arise, is politically impeccable. If the result is to restrict its jurisdiction, and conversely to enlarge the number of constitutional issues in which the High Court can claim finality for its decisions, it is in keeping with the trend of opinion in Australia.

The fundamental claim of this case to importance, however, rests on the substantive issue. The terms of section 92 are well known: ' On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free '. Its history is an incredible judicial labyrinth, ' a wilderness of single instances ' in which contradictory decisions and obiter dicta jostle between the presumed intention of the ' Founding Fathers ' and the judicial concept of social welfare. One thing is clear now, that the demonstrable intent of the founders of the Constitution has been progressively distorted by a series of decisions which yield little consistency or principle. To ask—in the light of these cases—whether the Constitution protects private enterprise against socialisation, is, in the very nature of judicial review, to pose a meaningless question. The Constitution can give no answer unless we ask : *socialisation of what, how, when, why, and by whom.*

Section 92 raises two questions : (a) what is the scope of ' trade commerce and intercourse ' and, (b) what is the freedom predicated by the words ' absolutely free '. On the first question, the

Commonwealth argued that inter-state trade commerce and intercourse was solely concerned with the movement of tangible commodities from one State to another. Banking was an intangible, an instrument of trade and commerce; hence fell outside the operation of section 92. The Privy Council rejected this argument, adopting the reasoning of Justice Dixon, who, in the High Court, trenchantly criticised this 'primitive' and 'reactionary' interpretation.

Next, it turned to the second question: Granted banking falls within the meaning of 'trade commerce and intercourse' does the prohibition of private banks infringe the freedom guaranteed by the words 'absolutely free'? The Privy Council approached this problem in two stages: In the first place it considered the question, is the freedom guaranteed by section 92 a personal right attaching to the individual, or to the subjects of trade commerce and intercourse, whether tangible or intangible? If, for example, the flow or volume of inter-state trade is unrestricted, is the freedom prescribed by section 92 satisfied, irrespective of the effect on the individual? In short, does section 92 guarantee the freedom of private enterprise or not?

The Commonwealth argument was inherent in the ambiguity of the *James Cases*, *infra*. Section 92 knew nothing of private or State enterprise. The historical intent of section 92 was to protect the free flow of goods from one State to another, irrespective of its instrumentality, the State or the individual. When the High Court erects section 92 as a guarantee of private enterprise, it destroys its original intention. Equally important, it distorts the decision in *James* v. *The Commonwealth* [1936] A.C. 578, the classical opinion on section 92.

This argument the Privy Council rejected also. In its opinion, the *James Cases*, if anything, were decisive against the Commonwealth. In each of the three major *James Cases*, *James* v. *South Australia* (1927) 40 C.L.R. 1, *James* v. *Cowan* [1932] A.C. 542 and *James* v. *The Commonwealth* (*supra*), an individual had 'vindicated his freedom'. Hence, 'it would be a strange anomaly if a grower of fruit could, successfully challenge an unqualified power to interfere with his liberty to dispose of his produce at his will by an inter-state or intra-state transaction, but a banker could be prohibited from carrying on his business both inter-state and intra-state, and against the prohibition would invoke section 92 in vain. . . . It is no answer that . . . the Commonwealth will provide the banking facilities that the community may require'.

Therefrom, the Privy Council entered the second stage: Granted that section 92 is a personal right of the individual, is the freedom guaranteed, absolute or qualified? And if qualified, how far does the immunity of an individual or corporation engaged

in inter-state trade commerce and intercourse extend? Conversely, how far is governmental regulation permissible?

The Privy Council's answer to the first question—'regulation of trade commerce and intercourse among the States is compatible with its absolute freedom'—simply accepts the least common denominator in the controversy over section 92. The second question, however, touched the heart of the problem. If, as their Lordships point out, 'the conception of freedom of trade commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual' where is the boundary between 'restrictions which are regulatory and do not offend section 92 and those which are something more than regulatory and do so offend'? Is the power to prohibit the carrying on of banking business by private banks a permissible regulation of trade commerce and intercourse or not?

The criterion has evoked only a shade less discussion than its application. We enter a twilight world of tautology, judicial groping and microscopic distinctions. There seems no clear answer in what we have been given. In the Privy Council's view, 'Section 92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote'. How far the language of the law of torts, of *Re Polemis*, and the 'remoteness of consequence' doctrine can resolve the problem of section 92 is highly dubious. We are not told how to test 'direct' and 'indirect' interference; nor what is 'consequential' or 'remote'. Granted the difficulty of framing a principle of universal application, we are left to the facts of each case, and to uncertain decisions founded on uncertain principles.

In the *James Cases*, a restriction of the volume or free flow of inter-state trade in dried fruits was a precondition of the Federal-State marketing schemes. Without the restriction of inter-state trade, it was impossible to effect the purpose of the legislation—to establish a stabilised 'home price' for dried fruits by the 'quota' method. In the present case, however, the restriction of the volume of inter-state banking was clearly not contemplated by the Banking Act, the object of which was to establish a public monopoly in banking. Yet, given the view that section 92 created a 'personal right in the individual' the 'direct' result or necessary effect of section 46 of the Banking Act was to extinguish the right of an individual to engage in the business of banking. In the Privy Council's opinion therefore, section 46 was 'aimed or directed at' the freedom of inter-state trade commerce and intercourse.

The decision poses many questions. Its technical anomalies are clear. Two questions may be briefly raised: What are the implications of this decision on the Banking Act of 1945 which vests

the Commonwealth Bank with extensive regulatory powers over the investment and credit operations of private banks? In this decision the Privy Council dealt solely with a case of undisguised prohibition of private enterprise. Its conclusion affirms the opinion in *Australian National Airways Proprietary, Ltd.* v. *Commonwealth* (1946) 71 C.L.R. 29 that a 'simple legislative prohibition as distinct from regulation . . . is invalid'. There is little to suggest that their Lordships, directly or indirectly, cast doubt on the regulatory provisions of that Act.

What of socialisation in the future? Is this opinion decisive? Is each case of prohibition or suppression of private competition certain to meet the same fate as the Banking Act of 1947? There is no detailed frame of reference from which the question can be answered. We are left therefore with no clear guide to the solution. Indeed, what is worse, the Privy Council has left an obiter dictum which might have been drawn from Rousseau's analysis of the General Will:

> '. . . their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and *it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-state trade commerce and intercourse thus prohibited and thus monopolised remained absolutely free*'.

There is no need to comment on these words.

S. R. DAVIS.

FURTHER REFLECTIONS ON FRANKLIN'S CASE

IN *Franklin's Case*,[1] Lord Thankerton stated: 'In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under section 1 of the Act and Schedule I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of or steps in, discharge of that duty'. His Lordship then observed that even before making the draft order, the Minister must have made elaborate inquiries and that 'the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the respondent, to whom that person reports, was for the further information of the respondent. . . . I am of opinion that no judicial duty is laid on the respondent in discharge of

[1] *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87. See 'The Limits of Judicial Review' by S. A. de Smith (Modern Law Review, July, 1948, pp. 314–7).

these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report. On this contention of the appellants no suggestion is made that the public inquiry was not properly conducted, nor is there any criticism of the report by Mr. Morris [who held the inquiry]. In such a case the only ground of challenge must be either that the respondent did not in fact consider the report and the objections, of which there is here no evidence, or that his mind was so foreclosed that he gave no genuine consideration to them'. His Lordship then dealt with the question of bias in these words: 'My Lords, I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute'. His Lordship then quoted cases dealing with judges and J.P.s and concluded: 'In the present case, the respondent having no judicial duty, the only question is what the respondent actually did, that is, whether in fact he did genuinely consider the report and the objections'.[2]

It has been suggested that the effect of this decision is to overrule the housing cases from *Errington* v. *Minister of Health*[3] to the present. Thus, Sir Alfred Denning writes: 'The task of the inspector [at a local inquiry] has sometimes been regarded as almost a judicial function. . . . He is not a judge and does not behave like one . . . . It had been commonly understood by lawyers that the inspector at the local inquiry, and the Minister in considering his order, must act, as it were, judicially, and must observe the elementary rules applicable to judicial functions, such as to give each party [? the opportunity] of dealing with information adverse to him. That view must now, it appears, be regarded as wrong. The Minister in these matters is not exercising judicial functions, but administrative functions'.[4] Mr. H. W. R. Wade appears to reach the same conclusion, though with more doubt.[5] It is submitted, with respect, that *Franklin's Case* does not have this effect.

The rules which control an adjudicator are wider than those which control an administrative authority. In particular, an adjudicator (used in Lord Thankerton's sense) must be independent

[2] Pp. 102–4.
[3] [1935] 1 K.B. 249.
[4] *Freedom under the Law* (The Hamlyn Lectures, 1949), pp. 119, 121.
[5] 'Quasi-judicial and its background', 10 Camb.L.J. 216, 240.

and unbiased; he must not be a judge in his own cause; nor must there be the appearance of bias. An administrative authority is often required to follow a certain procedure before making a decision. The housing cases indicate that something more than a mere following of the procedure is required. The objector or the applicant must be given a fair hearing.[6] This is true even where no particular procedure is laid down.[7] In some cases, he is entitled to see certain documents so that he may present his arguments fully. But he cannot assert that the hearing is bad because the administrative authority had an interest in the decision and was therefore biased. It is clear that Lord Thankerton when he said 'no judicial or quasi-judicial duty was imposed on the respondent' meant that the respondent was not an adjudicator. This is shown by the later part of his speech which is quoted above when he speaks of 'a quasi-judicial office, such as an arbitrator'. An adjudicator does not preside over a trial merely for his '*further* information'. Since the Minister was not adjudicating, bias was irrelevant. But it does not follow that other considerations such as the right to a fair hearing, are equally irrelevant. Indeed, his Lordship specifically pointed out that there was no question of the inquiry being improperly conducted, and he adds that '*in such a case*' the only ground of challenge must be that the Minister did not observe the terms of the Act. It is true, as Sir Alfred Denning says, that the inspector is not a judge. But this only means that bias is irrelevant. It does not mean that the inspector is free to disregard 'the elementary rules applicable to judicial functions, such as to give each party [? the opportunity] of dealing with information adverse to him'. Sir Alfred is not using the term 'judicial' in the same sense as Lord Thankerton. An adjudicator must act 'judicially' in all the meanings of that word; an administrative authority must act 'judicially' in a limited, procedural sense and absence of 'bias' does not fall within those limits. Lord Thankerton was not considering the quasi-judicial functions of administrative authorities as that term is usually used. He quoted none of the housing cases. The appellants could not show that the Minister or his subordinates had failed to follow the procedure 'judicially'. They were left to argue bias in the Minister. And this, as Lord Thankerton observed, was irrelevant.

Lord Thankerton defines what he means by bias in the passage quoted. The Minister and the inspector are known to have an interest in the matter. It is the right of the Minister to have and to implement a policy which is protected by *Franklin's Case*. The Minister and the inspector approach the problem as individuals in the government machine. But it is possible for either of them to have not only an official but also a personal interest. They may

[6] See also *Broadbent* v. *Rotherham Corporation* [1917] 2 Ch. 31.
[7] *Hall* v. *Manchester Corporation* (1915) 84 L.J.Ch. 732.

be interested as owners of adjoining property or because a member of their family is involved. 'Bias' is also used in this sense, but it is not with this that we are concerned. It is simpler to say that the courts in such cases upset decisions because of mala fides, and limit the use of the word 'bias' to the meaning which Lord Thankerton was considering: the duty of an *adjudicator* to be impartial.

J. A. G. Griffith.

Recent Scottish Decisions

Partnership.

Again diverging from the outlook of English law the law of Scotland has, since the seventeenth century, recognised the existence of a partnership as a distinct legal '*persona*'; nor is any distinction made in this respect between 'partnership' and 'joint adventure'. The implications of such recognition were discussed in *Mair* v. *Wood*, 1948 S.C. 83, where the action was one of reparation for personal injury. The pursuer had entered with four others into a share-fishing joint adventure, one partner contributing the boat and gear, the other four contributing their services as crew. When the vessel was at sea in pursuance of the joint adventure her propeller was fouled; and, in order to clear the obstruction, the partner who was acting as skipper removed the engine-room floor-boards. Before these had been replaced, the pursuer, on descending to the engine-room, put his foot through the opening on to the revolving shaft and coupling, and, as a result, sustained serious injuries. He ultimately directed his action against the five partners in the joint adventure as such (including himself) his object being to constitute the debt against the partnership, and ultimately to recover from his co-partners the damages awarded, less the proportion which, as one of the partners, he would have to bear himself. The First Division rejected the defenders' objections to the competency and relevancy of the action, so far as they were based on a suggested distinction in principle between partnership and joint adventure, and also so far as they sought to invoke the doctrine of *confusio* to prevent the pursuer from being simultaneously debtor and creditor. In considered opinions the Lord President (Cooper) and Lord Keith, reaffirmed the doctrine of the separate '*persona*' as applicable to partnership and joint adventure alike; considered arguments based on *confusio* to be inapplicable; and thus far were in favour of the pursuer. They proceeded, however, to dismiss his action against the joint adventure on the grounds that it was not vicariously liable for the loss or injury to a partner sustained through the delict or quasi-delict of another partner. The Lord President pointed out that when, in section 10 of the Partnership Act, 1890, the liability of a firm for the wrongful acts or omissions of a partner was formulated, the rule was in terms limited to the case where loss or

injury had been caused to any person *not being a partner of the firm*; and this section he regarded as declaratory of the common law of Scotland. Lord Keith, who entered fully upon the authorities, including the institutional writers and the pandects, based his opinion on several grounds. He pointed out that certain breaches of the duty owed by a partner to the partnership in the conduct of its affairs grounded an action against the delinquent partner by his co-partners for the loss caused to the partnership or to their interests as partners. Were the pursuer's argument right, then any such wrong should give the injured partners a claim against the partnership with contribution to the claim among themselves—a situation which he regarded as an impossible one and inverting the whole rights of parties. He considered the pursuer's claim to be a purely personal claim by an injured party against the negligent party. Lord Keith also supported his view by the terms of section 10 of the Act, and proceeded to examine the situation in the light of certain passages in *Pothier on Partnership* (Tudor's translation, 1854, pp. 93, 94), where the view of Julian and the Sabinians was quoted to the effect that a partner, wounded by slaves whom he was taking to sell at a market on behalf of the partnership, and whom he had sought to hinder escaping, ought to be indemnified for medical expenses for his cure. His Lordship suggested, after referring to section 24 of the Partnership Act, that if a partner on board a ship, engaged in trade for the partnership, incurred liability in attempting to salve her or her cargo he would be entitled to be reimbursed by the partnership; that such reimbursement might include medical expenses necessary to fit him for his journey back to the seat of the partnership; but that, if he lost a leg in the disaster, there was no principle upon which the partnership would be bound to compensate him for its permanent loss. *A fortiori* this was the case where the injury was through negligence of a fellow-partner; against such a wrong-doer personally the injured partner must avail himself of his common law remedy.

Delict and Quasi-Delict.

In the field of negligence which is concerned with actions arising out of *culpa* in its narrower sense, the laws of England and Scotland are mainly in harmony. *Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31, though Scottish by origin, can trace its ancestry on both sides of the Border. The Scottish law of delict, however, is not built up from a classification of named ' torts ' but is fundamentally based on the concept of *culpa* (in its broader sense). Thus English decisions on absolute or strict liability (other than breach of statutory duty), are dangerous precedents to quote in a Scottish court. Scottish lawyers have always resented the foisting upon them of the doctrine of *Rylands* v. *Fletcher*, for which there was no historical warrant, by certain decisions of the House of Lords. In what Lord Macmillan has

judicially described [1] as ' the excellent survey of the history of the law of reparation which he contributed to the . . . Encyclopædia of the Laws of Scotland ', Mr. Hector McKechnie K.C. has submitted [2] that the doctrine of *Rylands* v. *Fletcher*, if it obtains in Scotland at all, must be confined to exactly the *species facti* which were covered by the decision of the House of Lords in *Caledonian Ry.* v. *Greenock Corporation*, 1917 S.C.(H.L.) 56, *i.e.*, to escape of water alone. In the case of *McLaughlan* v. *Craig*, 1948 S.C. 599, the First Division refused to extend the principle of *Rylands* v. *Fletcher* to the installation upon property of gas pipes which deteriorated and permitted an escape of gas which caused an explosion. The Lord President said, ' in view of the assistance which the pursuer sought to derive for his case against the first defenders from *Rylands* v. *Fletcher* and its derivatives, it may be permissible to utter yet another warning against the dangers to our native principles which attend the incautious use of English precedents bearing upon this highly controversial branch of law, the limitations of which have recently required to be pointedly stressed in an English appeal (*Read* v. *Lyons & Co.* [1947] A.C. 156). It is now recognised in England that the extreme form of the rule of absolute liability is simply a modern revival or survival of the medieval principle of English common law that a man acts at his peril; and England has been groping for a characteristic compromise between that " coarse and impolitic idea " and the doctrine of *culpa* as the indispensable basis of delictual liability (see *per* Lord Macmillan and Lord Simonds in *Read* v. *Lyons & Co.*). In Scotland we have never felt the need to seek any such compromise, for the medieval rule has never been part of our law. There are of course cases in which there is little difference in the result between the application of the English rule of absolute liability and the Scottish rule of *culpa* where the facts raise a presumption of negligence as practically incapable of being displaced. But when it comes to extending the rule in *Rylands* v. *Fletcher* to situations undreamt of by those who formulated it, we cannot ignore the wide distinction in principle between the two systems without destroying the very basis of the Scots law of delict '.

Possibly, as the writer set for himself the noting of divergencies rather than of similarities of approach to common problems, the passage just quoted is a suitable note on which to conclude, striking as it does a note of friendly rivalry which both systems may welcome as a safeguard against the conceit that either enjoys the monopoly of revealed wisdom.

T. B. Smith.

[1] *Stewart* v. *L.M.S.*, 1943 S.C.(H.L.) 19 at p. 38.
[2] Vol. 12, article ' Reparation ', p. 493.

REVIEWS

THE JURISPRUDENCE OF INTERESTS. Selected writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, Hermann Isay. Translated by MAGDALENA SCHOCH. With an Introduction by LION L. FULLER. Twentieth Century Legal Philosophy Series. Vol. 2. Cambridge, Mass. Harvard University Press. [London: Geoffrey Cumberlege, Oxford University Press. 1948. xv and 330 pp.]

SOME introduction to the writings of the so-called Tübingen school or Jurisprudence of Interests has long been a desideratum in the English literature on jurisprudence. It has been said that the writings of a thinker or a school of thinkers are ripe for presentation in the form of an anthology if they comply with two requirements: they must have passed their day, but they must be sufficiently important to be remembered after their day has passed. On this test the time for the publication of an anthology of this type has certainly come. The Tübingen school has made an important contribution to the legal thought of Central Europe. Its influence on legal practice has been considerable. But its day has gone. The problems which it sought to solve are no longer in the forefront of discussion. The men who formed it are no more with us. Its opponents are no longer formidable. Many of its ideas have been accepted. Some of them have become trivial. Outside Central Europe both its achievements and its failings are hardly known. The publication of the present volume must, therefore, be welcomed as an important contribution to the understanding of Central European legal thinking during the last four decades.

The jurisprudence of interests—like other systems of thought—is best understood by considering the forces which it arose to oppose. The methodology of the governing opinion in Germany during the last quarter of the nineteenth century was the result of a combination of ideas inherited from the historical school of the early nineteenth century with the intense enthusiasm for positivism inspired by the codification movement. The historical school had begun with considering the law as a creation of the 'Volksgeist'. But it found great difficulties in finding a suitable bearer of the Volksgeist. It soon came to think that the legal profession rather than the people were the creators of the law. As, however, most members of the historical school greatly preferred the Roman law to the Germanic legal system and as the only people who really shared this view were the professors of law, the latter came in fact, though, of course, not in theory, to be the true representatives of the Volksgeist such as the historical school understood it. Unfortunately this fraction of the legal profession was singularly unfit for the task of developing the law. The typical theoretician of that period knew little of the non-legal world. He cared for it even less. Savigny's letters to his friends disclosed the contempt with which he looked down upon the 'businesses' of the common world, including the 'business' of being a judge, to which unfortunately so many of his friends had to devote their time. If a school led by 'pure' theorists had to undertake the task of interpreting and developing the law, it could not well draw its inspiration from considering social, moral, economic and other teleogical arguments. It hardly knew of their existence and even less of a proper way of appreciating them. The law should and could, it was claimed, be interpreted and developed solely by means of considerations drawn from the law itself. This was a procedure which had a great deal in common with the manner in which Baron von Münchhausen tried to drag himself out of a bog by his own pigtail. The only data given

to legal science were the particular legal rules. The task of legal science consisted in distilling from these particular legal rules general legal conceptions common to all, or at least, to some of them. These general conceptions on their part could be used for the formation of fresh legal rules. Because the fresh legal rules gained in this way would use more general conceptions they would also cover more cases than the particular rules from which the general conceptions had been drawn. Thus the law, properly combined with analytical thinking, carried in itself the source of an evergrowing expansion. There was no 'gap in the law', because the conceptions could, if properly formed, cover every case. This method was applied with great skill in the textbooks of the 'Roman common law' of the late nineteenth century, such as the works of Windscheid, Vangerow and others. But it attained its greatest achievements in the early period of the codifications. In the Roman common law the particular legal rules had to be obtained from an amorphous mass of sources, full of discrepancies and contradictions. Codification presented them ready made. The time formerly spent in finding what the rules were could now be invested in the never-ending task of generalisation. The German Civil Code is the work of a legislator who had himself fallen under the spell of this task. No wonder that it did more to encourage 'Begriffsjurisprudenz' than any other codification.

It is the great merit of the Tübingen school to have demonstrated the impossibility of this methodology. It will always remain strange that Jhering's work failed to do this. But Jhering had been exclusively concerned with the genesis of the law. He did not see that the influence of the purpose of the legal rule on its genesis had anything to do with the problem of interpretation. The early sociological lawyers like Ehrlich, Wurzel and others discovered this soon enough. Their criticism was important. But none of them replaced the old method by a new one which the practitioners could accept. Especially the influence of Ehrlich, who never attained an important university position, remained much more limited than the frequent quotations from his works in Anglo-American writings on legal theory would lead their readers to assume. To be successful the reformers had to comply with some requirements with which the early sociological theorists did not comply: they had to devote their attention to practical problems and not solely to legal theory, and they had to be specialists in private law and not criminal or constitutional lawyers. The majority of practising lawyers spend their time in the administration of private law. Arguments from other fields of law are as a rule lost on them.

The leaders of the Tübingen school complied with all these requirements. They did not confine themselves to philosophical generalities. They not only criticised the old, but devised a new method. They demonstrated their method in practice as well as in theory. And last but not least, they all were specialists in civil and commercial law with a great deal of understanding for the needs of legal practice.

The new school did not demand that the old gods were immediately burnt, as had the sociological jurists. According to Heck, the acknowledged leader of the Tübingen school, the old jurisprudence was not to be condemned as useless or harmful. Everyone could see only too clearly the great work which it had accomplished. But care had to be taken that it should be put to the right use. Every legal rule according to Heck can be scientifically analysed under two aspects. Under one aspect the legal rule constitutes a command. This was the starting point of the old jurisprudence and as such it was not wrong. Several commands may, taken together, constitute a legal institute. A number of legal institutes may constitute a legal system. To find the connection between the rules on which the institutes and ultimately the system was based, was the task for which analytical conceptions were needed. The search for conceptions, such as the Begriffsjurisprudenz pursued, was therefore by no means in vain. But what was the purpose for

which the conceptions, these institutions and the system itself were formed? Conceptions, institutions and system were required in order to define, to teach and to memorise. These were the purposes for which in every science conceptions and systematisation were required. But in law there were other tasks to solve. Interpretation and development were also tasks of legal science. But these other tasks could not be solved with methods which were not meant for them. They required their own method—a method which was utterly different from that of the governing opinion during the Begriffsjurisprudenz period.

The legal rule is not only a command. It is also a decision by the legislator in a potential dispute between conflicting interests. The law protects certain interests. It rejects others. Interests may be interests of individuals or interests of the community. They may be pecuniary or ideal. Frequently the interests of several individuals or communities are in conflict with each other. The legislator has therefore to make up his mind which of these interests deserve preference. He has—to use a simile frequently used by the Tübingen school—to balance the interests against each other and to decide which of them have the greater weight. This decision is incorporated in the legal rule. When new problems arise of which the legislator has not thought, the judge has to face the same task. Legal science must help him in this task. It can do so in two ways. In the first instance it has to place at his disposal a second set of conceptions, parallel to, but quite different from, those conceptions which are the result of the analytical investigation of the law. The new set of conceptions is derived from the second aspect under which the legal rule can be considered; from the interests, their conflicts and their appreciation by the legislator. Thus, 'agreement' and 'possession' are command or analytical conceptions, while 'reliance on a given word' or 'legal certainty' are interest or functional conceptions. The usual description of the law in the textbooks is based on the former set of conceptions. It serves its useful purpose there. But it is wholly useless and even obnoxious where the interpretation and the development of the law are under consideration. For this purpose the functional or interest conceptions only may be resorted to. In the second instance legal science can assist the judge and the legislator by ascertaining how the law, as in force at present, has solved those conflicts of interests with which it has dealt. The legislator's appreciation of opposing interests must form the basis of, and the model for, judicial appreciation of new interest conflicts. Thus the new jurisprudence has to rationalise those ethical and practical considerations which the old school used to hide behind empty phrases, such as the 'nature of things', the 'considerations of equity and fairness', etc.

'Begriffsjurisprudenz' is not the sole prerogative of the Continental legal system. It would be wishful thinking to believe that it has not left its traces on English law. We have it in all its various forms of appearance. There is the innocent form (sometimes called 'crypto-teleology'), where the 'Begriffsjurisprudenz' is merely a façade behind which a satisfactory appreciation of the real interests is hidden, as in Fletcher Moulton L.J.'s judgment in *Nash* v. *Inman* [1908] 2 K.B. 1. There is the less innocent form, where it has led the judge into a glossing over of important interests or into closing his eyes to all but one interest, as in *Elliott* v. *Crutchley* [1904] 1 K.B. 568. We have it in that most pernicious form in which it has resulted in a judgment completely ignoring the true interests, as in *The King* v. *The Home Secretary, Ex p. L. and another* [1945] 1 K.B. 7, or in *Coutts & Co.* v. *Browne-Lecky and others,* 62 T.L.R. 421. Excessive historicism or excessive literalism, too, are incompatible with a true appreciation of interests. The jurisprudence of interests would hardly take a favourable view of the rigidity of interpretation which has secured to the 'Words and Phrases, judicially defined' its recognised place among the tools of trade of the English legal profession.

The jurisprudence of interests has brought to the Central European laws liberation from the yoke of pseudo-logical thinking, from formalism and from the ignorance of the teleological aspects of the law, which the nineteenth century had left as a most unwelcome legacy. It has helped to shape the law into a more easily adaptable instrument in the hands of 'social engineers'. It is thus comparable to the work of Roscoe Pound. Though none of its leaders had the breadth of learning of the American master, the influence of the Tübingen school on the practice of the courts has been somewhat greater than that of the American sociological school, because it offered a much more neatly defined method in the place of the old jurisprudence than the sociological school ever produced.

Its failings, too, are not very different from those of the Roscoe Pound school. Legal practice cannot do without firmly defined conceptions. The jurisprudence of interests had promised to supply a second set of conceptions, the functional conceptions, which were to be used for the development of the law in the same way as the structural conceptions for its description and systematisation. It never kept that promise. The present volume does not render this as clear as do the systematic treatises of civil and commercial law by Heck, Müller-Erzbach, Locher and Stoll—all adherents of the Tübingen school. They are all based on the old structural conceptions, though on many disputed points teleological considerations are used in lieu of the old pseudo-logical ones. No doubt, Heck and his followers decided many disputed cases better than their predecessors. But this is not the same as developing a new jurisprudence. As F. v. Hippel has recently rightly said (in Reinhardt, *Einführung in die Rechtswissenschaft,* 1949, p. 312), Heck mastered the individual rule, at best the individual legal institution. But he never got beyond that stage. He never succeeded in evolving a functional legal system. Ideologically the Tübingen school was rudderless. Heck was proud of the fact that it was a purely legal affair, unconnected with contemporary philosophical thought. His ambition was merely to improve the tool which the legal profession was to use. He did not see that it would have been much more important—particularly in Germany—to improve the spirit of both the law and its administration. When National-Socialism came to power Heck and his pupils showed themselves eager to demonstrate that the new masters could use the knife which the jurisprudence of interests had sharpened.

Few things could today be plainer than the fact that the starting point of the jurisprudence of interests was wrong. Through all the writings of this school runs the desire to maintain the independence of legal science from any philosophical, especially from any ethical, system. This is clearly an impossibility. The conception of interests is meaningless without the requirement of an evaluation of interests. This in its turn requires a standard by which the values are to be appreciated. In order to decide which set of interests weighs heavier one must have a scale on which values may be compared with each other. The jurisprudence of interests never furnished such a scale. Hence its inability to develop interest conceptions or to combine the functional conceptions into a system. Hence its moral collapse before the ethical perversion of National-Socialism. Hence its insufficiency in times like the present, when the fundamental tenets of law and morality, and not the merely technical apparatus, form the centre of endeavours of those in Germany who are trying to reconstruct a legal system which—notwithstanding a great deal of skilful 'social engineering'—has broken down like few, if any, others in history.

The present anthology is unusual, because it presents not only the case for the jurisprudence of interests, but also that of some of its opponents. It gives well-chosen excerpts from its chief advocates, Heck, Rümelin and Stoll. But it contains also equally well-selected examples of the writings of its opponents. There is an essay by a conservative critic, Paul Oertmann, disclosing the fatal weakness of the old school. There is a significant contribution by Julius Binder, a philosopher of the idealist school—a brilliant exposure of the merits

and demerits of the Tübingen school, but utterly helpless in its attempt to replace the Tübingen methodology by one based upon the empty slogans of Binder's collectivism, a sort of forerunner of the Nazi theory of law. Last, not least, there is a most eloquent essay by Hermann Isay, whose position is very similar to that of the American realists—equally strong in the criticism of the existing jurisprudence and equally disappointing in its failure to give that guidance to legal practice which it is the duty of legal theory to provide.

Dr. Schoch, who is responsible for having selected and translated these writings, deserves the highest praise for the work which she has done. Her translation is evidence of most consummate skill in handling two very different languages and of profound understanding of two very different legal systems. Numerous brief notes assist the reader where he requires assistance, especially where the writers use unfamiliar examples or argue on the basis of rules which must appear strange to lawyers in the common law countries. To be able to appreciate fully the complexity of the task and the superb manner in which Dr. Schoch has succeeded in it, one must have experienced the difficulties encountered in translating foreign legal texts. Professor Fuller has contributed a graceful introduction, whose admirable lucidity gives additional weight to a volume which should be studied from cover to cover by every serious student of jurisprudence and legal theory.

Ernst J. Cohn.

Men and Measures in the Law. By Arthur R. T. Vanderbilt. With an Introduction by E. Blythe Stason, Dean, University of Michigan Law School. [New York : Alfred A. Knopf. 1949. 156 and xii pp.]

This book contains the text of five lectures delivered in April, 1948, at the University of Michigan. The author, now Chief Justice of the Supreme Court of New Jersey, can claim to speak with great authority on problems of law reform, for he has been for three decades both a legal practitioner and a law teacher, before being elevated in 1947 to the bench. In his view the field in which measures of reform are most urgently needed is that of procedure. The substantive law in his view requires some amount of revision and, above all, consolidation at regular intervals. But no far-reaching innovations seem to him to be required. Procedure, however, constitutes the 'stumbling block'. He points out that some institutions of English law which are as yet unknown in the U.S.A. have proved to be a great success here, such as what he calls the 'pretrial conferences' before a Master and the English type of argument where all points of law are argued orally before the court. He discusses the weaknesses of the American system of appointing judges and stresses the leading part which could be played by the law schools as rallying points for those interested in the discussion on questions of legal reform. He points out that the American Bar possesses no centre of learning and of learned discussion, such as were the Inns of Court in the sixteenth century. There is, in his view, no other institution except the law schools which could fill the void.

American conditions are obviously very different from those in this country. English readers will perhaps like to put a question mark behind the learned author's insistence that procedural reform must precede the reform of substantive law. One of the arguments with which the author supports his thesis is the lack of sufficient preparation for such reform. Surely, in this country at least, the science of legal procedure lags far behind that of substantive law. In fact, as Lord Chorley rightly pointed out in Vol. 12, pp. 319 ff., of this *Review*, the need for a scholarly treatment of legal procedure is not even universally admitted. There can be little doubt that English courts decide disputes more quickly than the very large majority of courts in other countries. The Rushcliffe Act will, it is hoped, cure their most glaring defect. In this

country, at least, there will be no need to defer reforms of the substantive law until after the problems of procedural reform have been more thoroughly discussed and resolved.

E. J. Cohn.

The South African Constitution. By Henry John May, of Gray's Inn, Barrister-at-Law, Advocate of the Supreme Court of South Africa. Second Edition. [Cape Town: Juta & Co., Ltd. 1949. viii and 447 pp. 48s.]

The first edition of this standard work was published in 1935 as *The Law and Custom of the South African Constitution*, by Professor W. P. M. Kennedy and H. J. Schlosberg. The new edition has been almost entirely re-written. More space has been devoted to topical constitutional controversies and to administrative law, and the section on the government of the non-Europeans has been substantially expanded. Other changes are less welcome. To quote the author's Preface, 'in an endeavour to save space and cost of production, . . . over 150 pages of historical matter in the first edition that took over five years of research have had to be omitted'. Inevitably this policy of ruthless austerity has deprived the work of some of its earlier distinction. Even the tables of statutes and cases have had to disappear.

The essential point, however, is that Mr. May has given us an invaluable up-to-date account of South African constitutional law. During the past year or so political developments in the Union have been closely followed by all students of Commonwealth relations and world affairs. The book was completed shortly after Dr. Malan came into power, and it enables the reader to survey the position as it was at the beginning of 1949. One cannot expect to comprehend the subtleties of the debate between the advocates of *apartheid* and the advocates of segregation without having readily available a clear account of the existing structure of legislative discrimination against non-Europeans. Mr. May provides such an account. It is also useful to be able to view the provisions of the South African Citizenship Act, 1949, against the background of earlier legislation set out by the author. For these reasons, if for no others, the new edition deserves to be widely read in this country.

In the first part of the book the author discusses the general principles of the Constitution. Here the greatest bone of contention is whether the so-called 'entrenched clauses' of the South Africa Act (in particular section 35, which safeguards the voting rights of Cape coloured citizens) can be repealed without having regard to section 152 of the Act, which prescribes a two-thirds majority of both Houses voting together. He agrees with the predominant view that since the Statute of Westminster, 1931, a simple majority suffices for any constitutional amendment. Part II, which is concerned with the Executive, is the least satisfactory part of the book. Almost as much space is devoted to an account of 'honours and precedence' as to the Executive Council and the Cabinet. One is given no information about the party system, the factors which enter into the choice of a Cabinet, or the practical working of the Cabinet system. Not even the names of the departments of State are listed. While one sympathises with the author's desire to avoid what he calls 'comment which might possibly have verged on the political', it is regrettable that he should have confined himself so narrowly to an exposition of strict law in this section. Part II concludes with an account of Crown proceedings. It is interesting to note that civil servants may sue for wrongful dismissal, that the Crown is in certain circumstances liable for wrongful acts of police officers, and that the courts are less reluctant than in England to construe a statute as binding the Crown by implication.

Part III contains an illuminating account of the law and custom of Parliament. It is apparently common for a strong candidate to stand for two

constituencies at a general election, in the hope that he will capture a borderline seat as well as his safe seat; if successful he will resign his safe seat (p. 146). In the House of Assembly the majority of speeches are subject to a time-limit of forty minutes (p. 158). A Member who is absent from the House has £6 deducted from his salary for each day of absence unless he has a very good excuse (the excuses are defined by statute), or unless the session is one in which the estimates of expenditure are considered, in which case he is allowed twenty-five days' absence. The author might perhaps have mentioned that when Parliament was dissolved in 1948 the estimates for the current session had not been discussed, so that an Indemnity Act had to be passed for the benefit of the over-optimistic absentees.

The position of the Provinces is considered in Part IV. This will be of interest to all students of comparative government, since the status of the Provinces lies midway between that of component parts in a federation and that of local government authorities. Moreover, the relationship between the provincial administrators and their executive committees on the one hand and the central government on the other present some peculiar features.

The administration of justice, the liberty of the subject, martial law, delegated legislation and administrative justice are discussed in Part V. The value of this section for students of comparative law and administration needs no emphasis.

Reference has already been made to the great value of Mr. May's account of the government of the non-Europeans. The book ends with a section on external relations, in which the author discusses the status of the Union in Commonwealth and world affairs, the treaty-making power, and communication and consultation within the Commonwealth. He makes the somewhat startling suggestion (at p. 389) that 'the time must inevitably arrive when the King will have to appoint a representative in the United Kingdom in the person of a governor-general or a regent. He will then in the truest sense be the independent King of each country in the Commonwealth and be lifted right out of any possibility of being involved in a conflict between his various ministries'. This is surely placing excessive confidence in the inevitability of gradualness. It is unwise to assume that equality of status will be pushed to its logical conclusion. There seems no likelihood that the United Kingdom will ever agree to such a proposal.

Attention is drawn to a few errors: the date of the Crown Proceedings Act was 1947 (p. 61); Tanganyika and Nyasaland are not Crown colonies (p. 115); New Zealand adopted sections 2–6 of the Statute of Westminster in 1947 (p. 388); in a footnote on p. 389 the author speaks of 'Hindustan' and 'Pakestan'.

In conclusion, while cordially welcoming Mr. May's contribution to the literature of constitutional law, one wishes that he had permitted himself a little more freedom of comment at times so that he could have given us a more comprehensive picture of the practice of government in the Union. Perhaps some scholar will strike a balance between the reticence of Mr. May and the ebullience of the late Professor Berriedale Keith, and give us an account of the government of the Union comparable with Professor Dawson's recent work on the government of Canada.

S. A. DE SMITH.

ESSENTIALS OF MAGISTERIAL LAW. By C. B. V. HEAD, LL.B. [London : Winchester Publications, Ltd. 1949. xxii and 543 pp. (with index). 35s.]

SEVERAL small books have been published of recent years intended to set out the essentials of magisterial law. This is a much more ambitious work and is aimed rather at lawyers whose practise takes them only occasionally into

criminal courts; at the more conscientious and studious type of lay justice; and at the police officer who so often assumes the role of prosecutor in all but the more complicated type of case. It can hardly fail to prove of real utility to members of all the three classes for whom it is designed. As the author points out in his Introduction, *Stone's Justices Manual* which is the classical textbook is hardly for the 'ordinary human being': indeed, it is distinctly frustrating for even a professional lawyer to try and find his way about its 3,000 pages unless he has had constant practice in doing so.

Mr. Head makes use of his long experience to pick out those aspects of the law which are most frequently dealt with in magistrates' courts. On the whole his selection seems to have been made wisely, though it is evident that his work has been chiefly in the metropolis, for if he had practised in a rural district he would undoubtedly have included a good deal which is not here, and perhaps have left out substantial portions of what is. Even within the ambit of the urban material the treatment accorded is often cursory, as in the case of sale of food offences which is only touched upon, the common case of watering milk being omitted altogether. There are, however, bound to be differences of opinion on this sort of point, and on the whole we think that Mr. Head has made a wise choice of subject-matter. His most doubtful decision was perhaps that of leaving out all the war-time offences: food rationing and price control are likely to be with us a good deal longer, and offences arising thereunder are often before magistrates' courts, indeed, the expression 'black market' is defined in Mr. Head's glossary, which seems rather unnecessary if the subject-matter thereof is not to be more fully dealt with later.

This brings us to the scheme of the book which is divided into five parts: (1) a glossary of magisterial law terms; (2) notes on procedure; (3) specific offences; (4) epitomes of leading cases; (5) selections of the more important statutory enactments. The glossary is not confined to law terms since a number of colloquial expressions are explained, as black market, bottle party, cat burglar. Here again it is possible to point to omissions as bench warrant, police court, locus, etc., but most of the tests we made showed positive results.

The Notes on Procedure will probably prove the most valuable part of the work. Some sections of it, such as the detailed description of the cases where arrest can be made without warrant, supply a long-felt need, and much of it is not, as far as we are aware, so compactly and lucidly set out in any other textbook.

Most of Part III is taken up with summarised material on sixty-eight separate offences. This material is then for each offence analysed under a number of headings which as far as practicable are used in each case, as definition, class of offence, place of trial, special defence, maximum punishment and analogous offences. In each case a number of useful notes are also appended, and these are as far as possible reduced to a number of common heads, as whether there is a six months' limit for complaint or information. This analysis which is carried out very carefully should be of great assistance to those who make use of the book.

Part IV consists of about 150 potted cases. It is here that the work is perhaps most open to criticism, as it is exceedingly difficult, if not impossible, to make a half-page summary of a leading case without from time to time saying something which is liable to prove misleading. Where we have tested these summaries, however, we have found them skilfully made. It is rather irritating that these cases can only be related to the Notes on Specific Offences by using the Index of Cases at the beginning of the book, an awkwardness which should be put right in the next edition which we imagine will be called for quite soon.

Part V which is actually the longest part of the book, contains a useful selection of sections quoted verbatim from statutes, and Statutory Rules and Orders.

C.

CRIMINAL PROCEDURE FROM ARREST TO APPEAL. By LESTER BERNHARDT ORFIELD. (Judicial Administration Series.) New York University Press. [London : Geoffrey Cumberlege. 30s.]

THIS lucid and stimulating work by Professor Orfield of Temple University is the sixth volume in the Judicial Administration Series published under the auspices of the National Conference of Judicial Councils (of the U.S.A.). The object set for this series is that each volume therein shall trace the history of the subject, sketch the law as it stands at present, and then set up sound standards of practical reform for the guidance of judicial councils of States and of others interested in problems of administration of justice. While the learned author is primarily concerned with examination, statement and reform of the American systems of criminal procedure, his book well deserves the attention of the serious student of the history and comparative aspects of criminal law, and, in particular, of those concerned with practical problems of reform in Great Britain.

Professor Orfield has studied and taken into consideration the Continental systems, but also, and, in particular, that of England in evaluating current criminal procedure in America. His dispassionate survey of the merits and demerits of the American and other systems has especial value for the English criminal lawyer and legislator. A comparison of English and American procedure in the stages prior to trial stimulates thought. The Grand Jury, an essentially Anglo-American institution, was abolished in England by the Administration of Justice (Miscellaneous Provisions) Act, 1933; but still remains in full force in the U.S.A., where, indeed, a statute depriving a certain class of the right to a Grand Jury would apparently be unconstitutional. The English lawyer, like many American lawyers, considers that the Grand Jury system is cumbrous, inflexible and formal. The learned author, who presents impartially arguments for and against the Grand Jury system, seems to consider that preliminary hearing before magistrates would not prove as satisfactory in the United States as it does in England, because of differences in calibre of the magistrates concerned. He points out, however, that the Grand Jury still has advantages as a check on public corruption, and on excessive zeal of the prosecution. Most important of all, its proceedings are secret—thus securing the citizen in America from an open and public accusation of crime, and the anxiety of a public trial before probable cause is established. This desirable privacy of pre-trial procedure is notoriously denied to an accused person in England, and, as Dr. C. K. Allen has recently stressed (*Times,* April 21, 1949), these things are better handled in Scotland, where preliminary proceedings before the Sheriff are not disclosed to the public. The learned author comments with approval on the measure of restraint exercised by the Press in England in reporting criminal trials, and refers to the relative license of the American reporting, as in the *Hauptmann Case.* There is little reason for complacency, however, as to the present English system which made possible such extravagant publicity as was given by certain sections of the English Press to proceedings prior to the trial for murder, and conviction, of John Haigh at Lewes Assizes in July, 1949. It may be noted that proceedings for attachment for contempt were brought against the *Daily Mirror* on behalf of the accused himself, and not by the Director of Public Prosecutions. The Attorney-General's reasoning in Parliament on this point (see *Times,* April 4, 1949) was most unconvincing. Other points noted for possible reform by Professor Orfield are the requirement of unanimity in the verdict of a jury and the desirability of formulating a more satisfactory rule with regard to eliciting statements from suspected and accused persons. The author notes the divergent and more satisfactory Scottish rules on these points.

One may note in conclusion the force of Professor Orfield's criticisms as to procedure after conviction. He rightly states that, although many days may be taken for trial, only a few minutes are devoted to fixing the sentence; and

that traditional sentencing practices are not well-suited to deal with certain types of crime. He considers the value of pre-sentence investigation, and urges that sentencing should be regarded as a somewhat complicated art, calling for special knowledge and a more enlightened outlook than is found in many a judge, however highly qualified technically as a lawyer. In a footnote the author observes the lack of systematic pre-sentence investigation in England. In another footnote he draws attention to the provision in Scottish procedure whereby sentence does not follow automatically upon conviction, but must be moved for by the Prosecutor, who is thus able to take into consideration aspects of the case which are possibly not strictly relevant to the trial itself.

Both for its scholarship and for its clarity of expression Professor Orfield's book should appeal to many a lawyer, jurist, sociologist and legislator in Great Britain.

T. B. Smith.

Palmer's Company Law. Nineteenth Edition by His Honour A. F. Topham, ll.m., k.c. [London : Stevens & Sons, Ltd. lxxx and 832 pp. 50s.]

The latest edition of this work has been revised in the light of the Companies Act, 1948, the text of which, together with the unrepealed sections of the 1947 Act, Tables of Comparison, the Companies Rules and the Winding-up Rules are reprinted in the Appendices which occupy from pages 456 onwards. The learned editor has also taken the opportunity of relegating most of the cases and case references to the footnotes in order that they should not interfere with 'the flow of the text'. Unhappily much more needs to be done before the text can really be said to flow; much of it is halting and almost unreadable.

The fact that this work has gone through eighteen editions in fifty years is sufficient proof of its value.

Nevertheless it is coming to be widely recognised that it is not a satisfactory book in its present form. Its principal defects are:—

1. Its arrangement is based upon no apparent principle of either logic or convenience. For example: Formation and Registration are dealt with in Chapter 2, but Promoters, Underwriting and Prospectuses not until Chapters 32–34; the Memorandum in Chapter 3, but the Name of the Company in Chapter 25; General Meetings are considered in Chapter 15, but Notices, Resolutions, and Majority Rights in Chapters 20–22 and Minutes in Chapter 24; the Directors in Chapter 16, but the Secretary and Other Officers in Chapter 28.

2. Although the whole of the Act is set out in an Appendix a considerable proportion of the text consists of a verbatim repetition of various sections, often with little or no comment or explanation. The position is even worse when only part of a section is quoted and another, which qualifies it, ignored; an example will be found on page 59 in which section 5 (1) and (2) are reprinted but no reference is made to subsection (9) which largely nullifies the limitations imposed by subsection (1).

3. There are numerous examples of the retention of ancient history now of little or no practical value (see *e.g.*, pp. 38–9, 68 and 99).

4. There is a considerable amount of unnecessary duplication. For example, the position of directors as agents is dealt with both at pp. 157–8 and 184–5, and the latter account is misleading as it ignores the position of an undisclosed principal.

5. The introductory chapter is most confusing. It attempts to distinguish companies from other associations but nowhere defines what a company is; in the absence of such a definition it is unhelpful to say that Building Societies and Industrial and Provident Societies 'are not companies but bear a great

resemblance to companies' (p. 6). It also contains a miscellaneous assortment of statutory definitions but not, for some reason, that of a private company which is not dealt with until Chapter 35.

6. The practical value of the book is much diminished by its failure to take into account the Borrowing (Control and Guarantees) Act, 1946, and the Exchange Control Act, 1947, and the regulations made thereunder.

7. The treatment of certain important matters is entirely inadequate; for example, Accounts (Chapter 18), the rules relating to payment of dividends (pp. 200–204), the Prevention of Fraud (Investments) Act, 1939 (p. 352), and the conversion of a private to a public company (p. 358). Other chapters are badly arranged and unnecessarily confusing; for example, Chapters 8 (Membership) and 34 (Prospectuses). The value of the latter chapter is greatly diminished by the failure to distinguish Issues, Offers for Sale and Placings or to explain the inter-relation of the statutory prospectus provisions and the Stock Exchange Regulations regarding advertisements to lead to permission to deal.

8. There are numerous examples of bald statements which are either misleadingly incomplete (*e.g.*, the interpretation of 'gain' at p. 240, the omission of reference to the Land Registration Act at p. 268, and the statements of *Moseley* v. *Koffyfontein Mines* at p. 305 and *Re Aidall* at p. 392), or meaningless (*e.g.*, the reader is told at p. 311 that 'Debenture stock of a company under the Companies Act, 1948, is essentially different from debenture stock issued . . . under the Companies Clauses Act, 1863', but this is the first and last reference to the latter type of debenture stock and the reader is left to guess how it differs).

9. There are no references, even in the Index of Cases, to the All England Reports. Indeed, the whole system of case referencing seems a trifle eccentric; for example, when a case is reported in at least three other series why only quote Weekly Notes in the text (p. 251, n. 7)?.

10. Apart from a very occasional reference to Palmer's *Company Precedents* no references are ever given to other books or periodical literature. Such references would be particularly valuable in a work which does not purport to be detailed or argumentative.

These criticisms must not be taken to suggest that the learned editor has not made a satisfactory job of revising the book in the light of the new Act and Rules. The suggested faults are a legacy of the past and many of them could only be satisfactorily eradicated by virtually rewriting the whole book. Nevertheless it is strongly felt that if it is to retain its place as a standard work, sooner or later such a radical revision will be inevitable. It is to be hoped that this will take place sooner rather than later and that when it is done the type of reader for whom it is designed will be more clearly defined and consideration given to the possibility of making it more suitable to the needs of students. The learned editor's qualifications for writing such a book are apparent from his own excellent little introductory work.

L. C. B. GOWER.

EXECUTORSHIP LAW AND ACCOUNTS (RANKING, SPICER AND PEGLER). By H. A. R. J. WILSON, F.C.A.A. Seventeenth Edition. [London : Sir Isaac Pitman & Sons, Ltd. 1949. xxx and 426 and (index) 13 pp. 30s. net.]

WHEN a book has reached its seventeenth edition, one may safely apply the maxim 'res ipsa loquitur'. *Ranking, Spicer and Pegler* has long ago established itself as the favoured textbook for the Schools of Accountancy and like many such works, has at various points practical utility for the student of law and not infrequently for the legal profession, especially when it is desired to view a topic from the angle of the accountant and the layman

concerned with the administration of estates. One of the main difficulties which confronts the text-writer on a legal subject intended either for the various auxiliaries to the practising lawyer or for laymen is that the reader in general has to approach a specific subject without necessarily having a foundation of law as a whole, and as law is concatenated and constitutes a broad unity, while for convenience subjects may be grouped or detached, it adds to the complexity of the task of the text-writer that he has either to explain the elementals of other spheres of the law necessarily touched upon or else must assume that the serious reader will turn to other works for information with the risk of the less intent over-running the signals through neglect to ascertain their meaning. The Editor has performed his difficult task with skill and evinced meticulous care in combining terse summarisation and general comprehensiveness with substantial accuracy. A wide field is covered, the chapters comprising 'The Devolution of Property on Death', 'Executors and Administrators', 'Death Duties', 'Powers and Duties of Personal Representatives', 'Distribution of the Estate', 'Creditors', 'Beneficiaries' (two chapters), 'Apportionment', 'Books and Accounts' and 'Investigation and Audit of Executors and Trustees Accounts'. When it can be seen that almost each chapter could form the subject of a monograph, it increases one's esteem of the work that a conspectus of all these subjects has been so admirably compiled.

However, there appears to be a *lacuna* of some considerable materiality, namely, the subject of Assents. Assents since 1925 have taken a place of the greatest importance among the legal instrumentalities, and it does seem that no work on Executorship Law can be regarded as complete without some account being given of the vesting of property in land in beneficiaries of deceased estate owners. Since the Land Transfer Act, 1897, the executor is very much concerned with the devolution of real property, strictly so called, and to state that 'to vest a legal estate in land the assent of the executor must be in writing' (Administration of Estates Act, 1925, s. 36 (4)) is inadequate. The vesting of settled land is not dealt with beyond mere mention, and that epoch-making authority, *Re Bridgett and Hayes' Contract* [1928] Ch. 163, is not cited. It is suggested that a chapter on 'Personal Representatives and Property in Land' will not only remedy an outstanding deficiency but bring the work as a whole into better proportion and make it within its obvious and natural limits a treatise of adequacy as well as accuracy. The occasional references to the subject could be thus conveniently collected together. The omissions are probably due to the structure of the work having been framed as far back as 1895 when personal representatives and property in land were not on the close terms of association which they are today. The above suggestion is commended with belief in its practical utility. The law stated is that at the end of 1947, and legislation, especially in relation to death duties, is now so frequently changed that already the chapter relating thereto must be read in the light and be supplemented by perusal of the later statutes and the guides thereto. There are some useful appendices, the matter of which again will need at points to be brought up to date.

A valuable feature of the work is a most useful glossary which *pro tanto* assists the non-legal reader to bridge over some of the chasms that are caused by any lack of acquaintance with the general principles of English law. For a future edition, it might be worth considering an expansion of the statement as to the utility and the practice of applications to the court on originating summons with a reference to that most helpful case, *Re Buckton* [1907] 2 Ch. 406, affording guidance in relation to the costs thereof. The book as a whole in its latest form upholds the high traditions it has won for itself in the library of the borderland between law and accountancy, and the chambers and offices of legal practitioners will find it an advantageous accession, while the law lecturer can turn to it for an apt clue to illustrate how the law works.

Bertram B. Benas.

THE 'PELEUS' TRIAL. Edited by J. CAMERON. War Crimes Trials Series, Vol. 1. [London : Hodge & Co. 1948. li and 247 pp. 18s.]

The 'Peleus' Trial is the first volume in a new series of War Crimes Trials now being published by the publishers of the Notable British Trials Series. This series is under the general editorship of Sir David Maxwell Fyfe, whose Foreword to this volume is in the nature of a Foreword to the whole series. Sir David points out that 'the punishment of men guilty of war crimes was not the sole object of the many trials conducted in Europe and the Far East. Their object was to establish the truth. After exhausting wars men tend to suffer from a certain weariness of mind. This lassitude can make men shrink from facing unpleasant facts. It exhibits itself in an easy-going scepticism as to how much was truth, and how much propaganda. Escapism as to gas chambers today might let the gas chambers escape from history tomorrow. . . . It is of the highest importance that there should be some selected record of selected trials for as many types of war crimes as possible . . . (for then) the would-be apologist will be faced by an impregnable fortification of truth' (p. xv).

From the earliest days of the war the Germans made clear that they had no intention of observing the laws concerning maritime warfare, particularly those portions concerning the safety of crews and passengers. Despite the fact that overwhelming evidence of this was presented in the case against Raeder and Doenitz at Nuremberg, it is perhaps meet that the first volume in the new series should be concerned with the murder of the survivors of a torpedoed vessel, especially as the chief accused made a deposition ten days before his execution to be used on behalf of Doenitz at Nuremberg.

It is almost inevitable that in a war crimes trial the defence will raise the plea of superior orders. The *Peleus* trial was no exception, although it must be pointed out to his credit that *Kapitänleutnant* Eck, the Commander of U-Boat 852, never raised this plea to justify his actions. Both Sir David in his Foreword, and Mr. John Cameron in his Introduction, which provides an extremely good account of the facts and a summary of the law involved, devote much space to discussing this plea. It is unfortunate that both seem to be under the impression that the fifth and sixth editions of Oppenheim's *International Law,* volume two, were edited by different persons (pp. xx and xlv).

The Greek steamer *Peleus* was torpedoed in the South Atlantic in 1944 by U-852. While the survivors were in the water their rafts and the wreckage to which they were clinging were fired upon by guns from the U-Boat. As a result of this action there were only three survivors. After the termination of hostilities the commander of the U-Boat and those members of his crew against whom there was evidence that they had fired or thrown grenades at the wreckage of the *Peleus* were tried for the war crime arising from the killing of the crew contrary to the rules of war. The trial took place before a British tribunal, but as the *Peleus* was a Greek vessel and Greeks were among the missing members of the crew, Greek officers sat on the tribunal together with British military and naval officers.

Among those charged with Eck was the medical officer of the U-Boat, who agreed that he had opened fire with machine guns. He admitted that he knew that as a medical officer protected by the Geneva Convention he was forbidden from participating in offensive warfare. He alleged, however, that he received a direct order to fire and had he not done so would have run the risk of being shot by his commander for disobedience in the face of the enemy. He attempted to defend himself by alleging that he had only fired at rafts and not at people, although he stated that the lights on the rafts had been doused by persons near or on them on the orders of the U-Boat. The court regarded this as prima facie evidence that he must have known of the presence of survivors on the rafts, and, having rejected his plea of superior orders, sentenced

him to death. Two others of the crew raised the plea of superior orders, but unsuccessfully. In this connection an interesting argument took place between the British prosecuting officer and the German professor of international law who pleaded on behalf of all the accused. The former maintained that the decision of the German Supreme Court in the *Llandovery Castle,* 1921, one of the war crimes trials after the First World War, was correct in its rejection of superior orders. Professor Wegner argued that the development of the submarine arm and the change in German psychology since 1933 required that this decision should be disregarded: 'The psychology of the German nation has changed since 1933, and with regard to the *Llandovery Castle,* that decision was treated as treason'. The learned professor was unable to persuade the Judge Advocate, or the tribunal, of the soundness of his arguments.

Another of the accused was the U-Boat's engineering officer. It was greatly in his favour that he was apparently the only person on the vessel who opposed the commander's order to open fire. Nevertheless, while the firing was in process, and without receiving any orders so to do, he displaced one of the accused from the gun he was firing and opened fire himself. His defence was sentimental and mystical to say the least. Knowing a little English, he had been detailed to interrogate two of the *Peleus's* crew, and realising that these men might be killed by the firing, 'I did not want that that man should be killed by bullets that had been fired by a seaman who was in my view a bad character'. The court accepted his original protest in mitigation of punishment, and he received a life sentence.

As pointed out above, Eck did not raise the plea of superior orders. His defence rested on military necessity, the allegation being that if wreckage remained on the surface of the sea it might be seen and endanger the safety of his boat and his crew. This defence failed in the light of his own sentence that 'I did not see any immediate danger on this night', and so, instead of departing from the scene of the sinking as quickly as possible, he stayed shooting up wreckage for five hours.

There are one or two points arising out of the procedure in this case that require mention rather than comment. During the hearing of evidence for the defence, defence counsel was reprimanded by the Judge Advocate for asking leading questions during his examination-in-chief; prosecuting counsel, however, was permitted to ask his first witness, a member of the U-Boat's crew, the following questions: 'Were two torpedoes fired at the ship ? . . . Did she sink ? . . . And the members of the crew took to the water ? . . . Was one member of the crew of the ship ordered over to the U-Boat and interrogated ?' On another occasion, too, the defence seem to have been unduly handicapped. An adjournment was requested by counsel to provide time for books to be consulted; 'After all, the court is administering International Law'. To this comment the Judge Advocate replied: 'That may be so, but, you know, the proposition that you will find in any textbook of International Law something which justifies what is alleged to have happened here is, I should have thought, a startling one'—this, before the case for the defence had been opened.

Due to the terms of the Royal Warrant governing the trial of war criminals, the law of evidence applied in the *Peleus Case* was very different from that normally encountered by an English lawyer. The court was permitted to admit any evidence, whatever its form, that it considered might help to ascertain the truth. In this case none of the survivors was examined or cross-examined; the court accepted the affidavits they had sworn in 1944 more than a year before the trial opened. The court even accepted a statement in one of these affidavits recording what a deceased member of the crew of the *Peleus* had said to the deponent about his conversation on the U-Boat.

The value of the first volume in this new series of War Crimes Trials is greatly enhanced by the addition in the form of appendices of all orders and other documents mentioned in the course of the trial or relating to the offence charged. It is also extremely useful to find in a work of this character the complete text of the decision in the *Llandovery Castle.* Presumably, this

practice will be followed in the future volumes of the series. It would render these appendices more helpful if a note were attached to each indicating the pages to which it refers in the report of the trial itself. Similarly, future volumes might well include an index.

L. C. GREEN.

AN OUTLINE OF THE NEW PLANNING LAW. By DESMOND HEAP, LL.M., L.M.T.P.I., Comptroller and City Solicitor to the Corporation of London. [London: Sweet & Maxwell, Ltd. 1949. xxiii and 163 pp. 15s.]

MR. DESMOND HEAP knows all that there is to know about planning law. He also has the ability to impart his knowledge in a lucid and economical style. His new book is all that one would expect it to be, and a detailed review would be superfluous. One need only point out that this is not a bald exposition of the Town and Country Planning Act, 1947. The book covers the whole field of planning law in remarkably few pages, without glossing over obscure points. For example, Mr. Heap discusses at some length what he considers to be the defect in section 23 of the 1947 Act, a matter which he has developed more fully in the *Journal of Planning Law*. The book should be found of the greatest value by practitioners, administrators and students who are loth to buy the longer treatises. Whether the author's hope that it will be equally useful to the general public will be fulfilled is more doubtful. It is likely to prove strenuous reading for the totally uninitiated.

It should be added that an outstanding feature of the book is the excellent arrangement of subject-headings.

S. A. DE SMITH.

LOCAL LAND CHARGES. By C. K. PHILLIPS, M.A., of Lincoln's Inn, Barrister-at-Law. (OYEZ PRACTICE NOTES.) [The Solicitors' Law Stationery Society, Ltd. 2s. 6d. net.]

MR. C. K. PHILLIPS in his booklet entitled 'Local Land Charges' has compiled a model guide on a subject of no little complexity and of growing importance. In an admirable introduction the learned author indicates the legislation now in force, points to the Forms in general use, rightly refers to the excellent 'Remembrancer of Local Land Charges' by Mr. A. H. Edwards, published by the Society of Clerks of Urban District Councils of England and Wales and shows where to search. There follows a section on the Definition of Local Land Charges and a general description of 'The Register' which is most comprehensive in range. The procedural passages are particularly helpful and the material provisions as to Priority Notices are conveniently set out. The booklet concludes with a well-arranged 'Summary of Procedure'. This is a booklet which should find its way to every Conveyancer's desk and, no doubt, as new developments follow, new editions will succeed.

BERTRAM B. BENAS.

WAR AND PEACE AIMS OF THE UNITED NATIONS. Vol. 2. From Casablanca to Tokio Bay. January 1, 1943—September 1, 1945. By LOUISE W. HOLBORN. [Boston : World Peace Foundation. 1948. lxv and 1278 pp. Bibliog., Index. $9\frac{1}{4}'' \times 6\frac{1}{4}''$. $6.00.]

THIS volume brings to completion the documentation on the War and Peace Aims of the United Nations, published by the World Peace Foundation, the first volume of which was produced in 1943. Now the record is brought up to the surrender of Japan in Tokio Bay. These documents and speeches provide the whole vast background to the final offensives waged by the Allies from 1943 to May, 1945, in Europe and the Far Eastern campaigns up to the collapse of

the Japanese Empire. The collection has been edited with meticulous care and scholarship, and the arrangement of the documents facilitates the task of reference. In the first section, which deals with general evolution of inter-allied relations, are included the important historical declarations and agreements between the five principal Allied Powers from Casablanca to Potsdam, a formidable collection in themselves. It also contains the texts of the armistice agreements with Italy and the satellites of the Axis Powers. The rest of the section covers the decisions of war crimes, and the various agreements of economic co-operation and reconstruction and cultural collaboration between the United Nations. Section two is devoted to the policies of the United Nations; by far the largest subsection deals with the policies of the five principal Powers as revealed in agreements, declarations and speeches by Government leaders. The remainder continues in the same way with information on the policies of the countries of Western and Eastern Europe, the Latin-American States, those of the Middle East and Africa.

Perhaps the main impression which one receives upon reading this material, particularly the speeches, is the optimism which was generally current among Government circles, with regard to the degree of unity of aid and the prospects for its continuation among the Big Three. This optimism was perhaps best expressed in the concluding sentence of the Teheran Declaration: 'We came here with hope and determination. We leave here, friends in fact, in spirit and in purpose'. In his speech of December 24, 1943, President Roosevelt declared: 'On the basis of what we did discuss, I can say even today that I do not think any insoluble differences will arise among Russia, Great Britain and the United States. . . . I believe we are going to get along all right with Marshal Stalin and the Russian people . . . very well indeed'. Mr. Churchill could say on May 24, 1944: 'Profound changes have taken place in Russia, the Trotskyite form of Communism has been completely wiped out. . . . The terms offered by Russia to Rumania make no suggestion of altering the standards of society in that country and were in many respects, if not in all, remarkably generous'. Marshal Stalin was no exception to this general optimism. In a speech to the Moscow Soviet on November 6, 1944, he emphasised that 'the alliance between the Soviet Union, Great Britain and the United States is founded not on casual, short-lived considerations, but on vital and lasting interests'. To read these statements at the present time makes us aware of the change in the political climate in the last three years. Nevertheless from the various documents on Soviet policy towards the States of Eastern Europe, in particular the agreement concluded with the Polish Committee of National Liberation, it is possible to trace the divergence of aims between the Soviet Union and the Western Powers, differences which were either not mentioned or glossed over in the public statements of the governments.

In short, this volume is a useful, indeed indispensable, source book for students of the political and diplomatic background of the Second World War and the post-war period. It collects and selects material, which students would otherwise have to glean for themselves from newspapers, parliamentary and congressional reports. But the material must be used with caution, and read in conjunction with other sources, such as the *Harry Hopkins' Letters* and *Cordell Hull's Memoirs,* if anything like an accurate knowledge of this period is to be gained.

Ieuan G. John.

Reports of International Arbitral Awards. Vol. 1, Leyden. [United Nations. Distributed in England by H.M.S.O. 614 pp. 30s.]

The 1948 budget of the United Nations provided for the publication of international case law, and this is the first volume of the series the result of co-operation between the United Nations Secretariat and the Registry of the

International Court of Justice. This volume contains cases decided after the end of the First World War. The collection is limited strictly to international decisions, namely, decisions in disputes between States. Awards in disputes between private individuals or bodies and States have been omitted according to the Foreword. It is not clear how the *Landreau Case* fits in with this rigid classification; here is a case where an individual claim against a State (Peru) is taken up and presented by another State (the U.S.A.). Technically no doubt this is a dispute between States, but it does suggest that the classification of the cases included in this volume is a little too rigid. Decisions of the Mixed Arbitral Tribunals set up under the Peace Treaties of 1919 have also been excluded as they have already been published elsewhere. The judgments and advisory opinions of the Permanent Court of International Justice have not been included either for they too have been published in other collections. Awards of the Permanent Court of Arbitration are included. Although each case is prefaced by a summary, this is too short and cursory to be of much value. The table of contents, a loose page inserted in the book, is inadequate and could have been better arranged, despite the fact that the last volume of the series is to include a fuller table of contents and an index. Nevertheless the volume is of considerable interest to students of international law and relations. Some of the cases illuminate such problems as the relation between municipal law and international law as interpreted by international tribunals.

IEUAN G. JOHN.

TREATY SERIES. Vol. 13. 1948. United Nations.

THE treaties included in this volume fall into two parts; those treaties and international agreements registered with the United Nations Secretariat on March 3, 1948, and those filed and recorded in the Secretariat from January 30 to March 3, 1948. With one exception, those in the first category take the form of exchanges of Notes between the United States Government and several other governments, in which the latter waive the most-favoured-nation provisions in previous commercial treaties with the United States, with respect to the temporary and transitional advantages granted by the U.S. Government to the Government of the Philippines, subsequent to the latter's independence in July, 1946. The Treaties in the latter section cover a number of agreements concluded during the Second World War between the United States and other countries on a variety of subjects. The greater proportion of the treaties take the form of an exchange of Notes concerning the service of nationals of one country in the armed forces of the other.

This is a useful addition to the series of treaties and agreements, whose publication the United Nations Organisation has taken over from its predecessor.

IEUAN G. JOHN.

UEBER OEFFENTLICHES RECHT UND PRIVATRECHT. EINE RECHTSSYSTEMATISCHE STUDIE. By DR. ERICH MOLITOR, ord. Professor in the University of Mainz, President of the Supreme Industrial Tribunal of the Land Rhineland-Palatinate. [Karlsruhe : Verlag C. F. Müller. 1949. 80 pp.]

THE Continental legal systems consider the distinction between public and private law as fundamental. Many, though not all, English systems of jurisprudence—such as Holland, Keeton and Paton—have followed this example, though other authorities, such as Salmond and, of course, Austin had little use for it. English practice at least has never shed any tears about it. The term 'public law' is, in fact, conspicuously absent from most law lexicons. Readers of Professor Molitor's interesting essay will not be surprised about this attitude on the part of the practitioners. Fundamental though the distinction is said to be, the theoreticians seem to be quite unable to say wherein

it consists. A Swiss writer distinguished in 1904 no less than seventeen different theories, but as Professor Molitor rightly says, this figure is long obsolete and the true figure is presumably nearer twenty-five. No wonder that those who are not content with the easy task of adding a twenty-sixth item to the all-too long list or to follow the example of Austin and Kelsen in denying the existence of the distinction, try to find out what is wrong with the question itself to which the distinction is intended to supply the answer. Professor Molitor's theory is clear and plausible: the public or private law character in his view does not pertain to an entire branch of the legal system, not even to an individual legal institution. It is merely a characteristic of the individual act-in-the-law and of the individual legal right or duty. There is obviously a great deal to be said for this view, if one considers how intimately connected rules of private and of public character are in our days and how they overlap or combine in one and the same legal situation. One may perhaps wonder whether the distinction in this form does still serve any useful purpose other than that of classification and systemisation. In English law—notwithstanding the textbooks on jurisprudence—this may very seriously be doubted. Though Professor Molitor's book does not claim to have said the last word on its topic, it constitutes a welcome, fresh and original contribution to a question which has too long been discussed on too rigidly traditional lines.

E. J. Cohn.

Annual Survey of South African Law, 1947. Published for the Faculty of Law of the University of the Witwatersrand. [Cape Town and Johannesburg: Juta & Co., Ltd. 1948. xx and 150 pp. 25s. net.]

This *Survey* was inspired by the now defunct *Annual Survey of English Law*. Its immediate cause was, however, the favourable reception which its suggested publication received from a number of lawyers who had returned from service, and who attended a 'Refresher Course' in the Faculty of Law in the University of the Witwatersrand in 1946.

The object of this *Survey* is not all-embracing; it is rather to provide a guide to practitioner, teacher, and student through the maze of South African case and statute law. In this it succeeds admirably. It is well arranged, consistently well written and well indexed.

Though this reviewer does not have an extensive knowledge of South African law, he is of opinion that the *Survey* will be of undeniable value to the English student of comparative law. It is interesting, for example, to note that a gift to the Spiritualistic Society which conducted the cremation service of the testator is no more charitable in South Africa (*Ex p. Hart* (1947) 4 S.A.L.R. 464 (W.L.D.)) than is a gift for the training of spiritualist mediums in England (*Re Hummeltenberg* [1923] 1 Ch. 237).

It is interesting too to discover that the South African doctrine of contracts for the benefit of third persons is not altogether free from practical difficulty, and it is enlightening to note that whereas they treat the trust as a type of contract for the benefit of third persons, we sometimes enforce the rights of third parties to a contract by superimposing the trust relationship.

These are but two examples of the wealth of comparative material which this excellent *Survey* provides.

O. R. Marshall.

Yearbook on Human Rights for 1947. [Lake Success: United Nations; London: H.M.S.O. 1949. xiv and 582 pp. 30s.]

According to the Charter of the United Nations it is one of the purposes of that organisation to promote and encourage respect for human rights. With

this end in view the Economic and Social Council instructed its Commission on Human Rights to arrange for 'the compilation and publication of a yearbook on law and usage relating to human rights'. The *Yearbook* for 1947 is the second in the series and contains all the constitutional and legislative measures concerning human rights passed or promulgated in 1947 in all the countries of the world, regardless of membership of the United Nations. Non-members Germany, Ireland, Italy, Japan, Spain and Switzerland are all included, as well as such a small country as Liechtenstein. Among the Spanish documents printed is the Charter of the Spanish People, first issued in 1945 and converted into a basic law in 1947. In addition all the relevant clauses in international treaties and agreements, together with those in trusteeship agreements, are printed. Finally there is a section devoted to the activities of the United Nations and its organs concerned with human rights from the inception of the United Nations until 1947. This section also reproduces the texts of all the relevant resolutions.

While the importance and value of this collection must not be minimised, it is important to bear in mind that it suffers from the same undue optimism as does the Charter of the United Nations. There still seems to be an impression that if a document says something it necessarily is so. No attempt has been made to discuss or show how these lofty legislative, constitutional and international obligations are given effect to in practice. It would greatly enhance the value of the series if future volumes had a section devoted to judicial decisions, and the *Yearbook* for 1948 might well begin with the American decisions in *Shelley* v. *Kraemer* and *Hurd* v. *Hodge*, both of which concerned racial covenants.

LESLIE C. GREEN.

REPORTS OF INTERNATIONAL ARBITRAL AWARDS. Vol. 2. [Lake Success: United Nations; London: H.M.S.O. 1949. 745 pp. 35s.]

IN its publication entitled 'Ways and Means of Making the Evidence of Customary International Law More Readily Available', the International Law Commission stressed the importance from this standpoint of collections of the decisions of international tribunals. The significance of such decisions may also be seen in Article 38 of the Statute of the International Court of Justice which describes them as a 'subsidiary means for the determination of the rules of law'.

The United Nations Budget for 1948 made provision for the publication, under the joint auspices of the Secretariat of the United Nations and the Registry of the International Court of Justice, of a new series of *Reports of International Arbitral Awards* dating from 1918, and, generally speaking, leaving out decisions that are readily available elsewhere.

In the second volume twenty decisions are printed including such important cases as the *Spanish Zones of Morocco Case*, 1925; the *Tacna-Arica Boundary Dispute*, 1925; the case between Great Britain and Ethiopia concerning the *Caravan of the Maharao of Kutch*, 1927; the *Goldenberg Claim*, 1928; the various claims arising out of the German Invasion of Portuguese Africa, 1928–30; the *Clipperton Island Case*, 1931; the *Chevreau Claim*, 1931; the *Salem Case*, 1932, formerly only available in American or Egyptian official publications; and *The Kronprins Gustaf Adolf*, 1932.

It is perhaps unfortunate that the compilers have adopted the policy of printing the official text of the award in French when delivered in that language, even when France is not a party to the case and Great Britain is. This has happened in connection with the *Spanish Zones* and the *Kutch Caravan* cases, It is submitted that in such cases an English translation of the award would be more suitable. It cannot be said that the official policy is to publish the originals because, for example, the award in the case between Germany and the Reparation Commission delivered by a Swedish Arbitrator in 1925 concerning

the German Industrial Charges Law of 1924 has been translated and printed in English.

Although the policy of the series is not to print awards that are available easily elsewhere, it includes the award of the Permanent Court of Arbitration in the *Island of Palmas Case,* 1928. This report may be read in full in the second series of Scott's *Hague Court Reports.* It is submitted that it would have been more useful if the volume had included such reports as those in the *Chattin Claim,* 1927, the *Oriental Navigation Co. Case,* 1928, or the *Cairo Claim,* 1929.

Despite these criticisms, one can only thank the persons responsible for compiling this series for the service they have rendered to international lawyers in making available in easily read volumes the full reports of so many important cases.

Leslie C. Green.

Annual Law Review of the University of Western Australia. Vol. 1, No. 1. [December, 1948.]

We are glad to welcome this, the latest, recruit to the goodly army of law reviews. It contains a large number of articles touching on a wide variety of topics and each of them succinctly written and to the point—long may the editors succeed in curbing the prolixity which so often marks the contributor to a legal journal. Much of the material is naturally concerned with subjects which are chiefly of interest to Australian or West Australian lawyers, but there are a number of articles of more general interest as 'Implied Conditions in Hire' by Professor G. W. Paton, 'The Rescue Cases Reconsidered' by Professor R. W. Baker, 'The Teaching of Comparative Law and Legal Education' by Professor W. Friedmann. These and other of the names on the title page are well known to readers of the *Modern Law Review,* and warrant the interest of a number which we may hope will be succeeded by a long series of equally valuable issues.

C.

Income Tax. By C. N. Beattie, ll.b. Second Edition. 1949. [Stevens & Sons, Ltd. 4s. net.]

The first edition of this book was reviewed in Vol. 11 at p. 372. In this edition the book is brought up to date as at August 1, 1949, incorporating the provisions of the Finance Act, 1949.

Other publications received :—

The Law of Income Tax. Tenth Edition. By E. M. Konstam, k.c. Third Cumulative Supplement. (Decisions and Statutes to November, 1948). [London : Stevens & Sons; Sweet & Maxwell. 128 pp. 8s. 6d. net.]

Chancery Lane and its Memories. By A. K. Bruce. [Butterworth & Co. (Publishers), Ltd. 36 pp. 5s. net.]

Deutsches Zivilprozessrecht, Französische Zone, Zivilprozessordnung mit den einschlägigen Bestimmungen des Gerichtsverfassungsgesetzes, des Besatzungsrechts und des Landesrechts. Textausgabe mit Verweisungen und Sachverzeichnis. [Published by the Ministry of Justice, Rhineland/Palatinate. 1949. VIII. 235 pp. Octavo. 6.80DM.]